(16,952.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 367.

JOHN W. BLYTHE AND HENRY T. BLYTHE,
APPELLANTS,

vs.

FLORENCE BLYTHE HINCKLEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 9, 1898.

1 In the Circuit Court of the United States in and for the Northern District of California.

JOHN W. BLYTHE and HENRY T. BLYTHE, Plaintiffs,
vs.
FLORENCE BLYTHE HINCKLEY, FREDERICK W. HINCKLEY, Her Husband, and The Blythe Company, a Corporation, Defendants.

Complaint to Quiet Title.

Now come John Wesley Blythe and Henry Thomas Blythe, the plaintiffs above named, by S. W. & E. B. Holladay, their attorneys, and for cause of action allege as follows:

First. That plaintiff John W. Blythe is a resident and citizen of the State of Kentucky, and plaintiff Henry T. Blythe is a resident and citizen of the State of Arkansas.

Second. That defendants are citizens, and each of them is a citizen, of the State of California.

Third. That plaintiffs are the owners, as tenants in common with each other, of the lands hereinafter mentioned.

Fourth. That said lands are bounded and described as follows, namely: That parcel of real estate situated in the city and county of San Francisco, State of California, beginning on the south-

2 erly line of Geary street, distant thirty feet and five inches westerly from the westerly line of Kearny street, thence southerly on a line at right angles to said southerly line of Geary street fifty feet and three-fourths of one inch to the northwesterly line of Market street; thence southwestwardly along the last-named line three hundred and eighty-four feet and ten inches, more or less, to the northerly line of O'Farrell street; thence westerly along the last-named line forty feet one and a half inches, more or less, to the easterly line of Dupont street; thence northerly along the last-named line two hundred and five feet; thence at right angles easterly sixty feet; thence at right angles northerly twenty feet; thence at right angles westerly twenty feet; thence at right angles northerly fifty feet to the southerly line of Geary street; thence easterly along the last-named line one hundred and fifty-five feet six inches; thence at right angles southerly seventy-four feet and six inches; thence at right angles westerly thirty feet; thence at right angles southerly three feet; thence at right angles easterly fifty feet and six inches; thence at right angles northerly seventy-seven feet and six inches to the southerly line of Geary street, and thence easterly along the southerly line of Geary street one hundred and fifty-six feet and six inches, more or less, to the point of beginning, being a portion of the block of land bounded by Kearny, Market, Grant avenue, and Geary street, and also all those various tracts and parcels of land in the county of San Diego, State of California, amounting in all to forty thousand acres of land, more or less, and standing

of record in the county recorder's office of said San Diego
3 county, in the name of Thomas H. Blythe, now deceased.

Fifth. That said lands are of the value of three millions of dollars and upwards.

Sixth. That said defendants, Florence Blythe Hinckley, and the defendant The Blythe Company, a corporation, and the said defendant, F. W. Hinckley, husband of said Florence Blythe Hinckley, and each of them, claim that they have or own adversely to plaintiffs some estate, title, or interest in said lands; but plaintiffs allege that said claims of defendants are false and groundless and without warrant of law, and their claims to said lands are a cloud upon plaintiffs' title thereto.

Wherefore plaintiffs pray that said defendants be required to produce and set forth in this action by what rights and upon what ground they claim right or title to said land as against plaintiffs, and that it be finally adjudged herein that defendants have not and that neither of them has any right or title to said lands or any part thereof, and that plaintiffs' title thereto be adjudged good and valid as against defendants and each of them, and for such other and further order, judgment, or relief as may be just, and that defendants, until the trial thereof, be restrained and enjoined from meddling or interfering with said lands or the rents and profits thereof, and for costs.

S. W. & E B. HOLLADAY,
Attorneys for Plaintiffs.

(Endorsed:) Complaint to quiet title. Filed December 3rd, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

4 In the Circuit Court of the United States in and for the Northern District of California.

JOHN W. BLYTHE and HENRY T. BLYTHE, Plaintiffs,
vs.
FLORENCE BLYTHE HINCKLEY, FREDERICK W. HINCKLEY, Her Husband, and The Blythe Company, a Corporation, Defendants.

Amended Complaint.

Now come John Wesley Blythe and Henry Thomas Blythe, the plaintiffs above named, by S. W. & E. B. Holladay, their attorneys, and, by leave of the court first had and obtained, file this their amended complaint, and for cause of action against defendants allege as follows:

First. That plaintiff John W. Blythe is a resident and citizen of the State of Kentucky, and plaintiff Henry T. Blythe is a resident and citizen of the State of Arkansas.

Second. That defendant The Blythe Company is a corporation organized and existing under the laws of the State of California and having its office and principal place of business at the city and county of San Francisco, in said State.

Third. That each of defendants is a citizen of the State of
5 California, and is a resident of and now resides within the northern district of said State of California.

Fourth. That plaintiffs are the owners as tenants in common with each other of the lands and all thereof hereinafter mentioned, described, or referred to.

Fifth. That one piece or parcel of said lands is bounded and described, as follows, namely:

Beginning at a point on the southerly line of Geary street distant thirty (30) feet and five (5) inches westerly from the westerly line of Kearny street, thence southerly on a line at right angles to the said southerly line of Geary street fifty (50) feet and three-fourths (¾) of one inch, more or less, to the northwesterly line of Market street; thence southwesterly along the said northwesterly line of Market street three hundred and eighty-four (384) feet and ten and seven-eighths (10⅞) inches, more or less, to the northerly line of O'Farrell street; thence westerly along the said northerly line of O'Farrell street forty (40) feet and one and one-half (1½) inches, more or less, to the easterly line of Dupont street; thence northerly along the said easterly line of Dupont street two hundred and five (205) feet; thence at right angles easterly sixty (60) feet; thence at right angles northerly twenty (20) feet; thence at right angles westerly twenty (20) feet; thence at right angles northerly fifty (50) feet to the said southerly line of Geary street; thence easterly along the said southerly line of Geary street one hundred and thirty-five (135) feet and six (6) inches; thence at right angles southerly seventy-four (74) feet and six (6) inches; thence at right angles
6 westerly thirty (30) feet; thence at right angles southerly three (3) feet; thence at right angles easterly fifty (50) feet and six (6) inches; thence at right angles northerly seventy-seven (77) feet and six (6) inches to the said southerly line of Geary street, and thence easterly along the said southerly line of Geary street one hundred and fifty-six (156) feet and six (6) inches, more or less, to the point of beginning, being a portion of the block of land bounded by Kearny, Market, Dupont (Grant avenue), and Geary streets, all in the city and county of San Francisco, State of California; that other parcels of said lands are all those various tracts and parcels of land situate in the county of San Diego, State of California, and standing of record in the county recorder's office of said San Diego county, in the name of Thomas H. Blythe, now deceased.

Sixth. That said lands, the tract thereof first described, is of the value of three millions of dollars and upwards.

Seventh. That said defendants, Florence Blythe Hinckley, and the defendant The Blythe Company, a corporation, and the said defendant, Frederick W. Hinckley, husband of said Florence Blythe Hinckley, and each of them, claim that they have or own some estate, title, or interest in said lands, and all thereof, adversely to plaintiffs, but plaintiffs allege that said claims of defendants, and each of them, are, and that each of such claims is, false and groundless and without warrant of law.

7 Eighth. That at the time of the commencement of this suit neither one of the parties was in possession of said lands nor any part thereof.

Wherefore plaintiffs pray that it be adjudged herein that plaintiffs are the owners of said lands and all thereof, and that defendants have not, and that neither of them has, any right, title, or interest in or to said lands or any part thereof adverse to the title of plaintiffs thereto; that plaintiffs be granted such other and further order, judgment, or relief as may be just, and for costs.

S. W. & E. B. HOLLADAY,
Attorneys for Plaintiff.

(Endorsed:) Amended complaint. Filed December 12th, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

8 Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California. In Equity.

The President of the United States of America to Florence Blythe Hinckley, Frederick W. Hinckley, her husband, and the Blythe Company, a corporation, Greeting:

You are hereby commanded that you be and appear in said circuit court of the United States aforesaid, at the court-room, in San Francisco, on the second day of November, A. D. 1896, to answer a bill of complaint exhibited against you in said court by John W. Blythe, who is a citizen of the State of Kentucky, and Henry T. Blythe, who is a citizen of the State of Arkansas, and to do and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty of five thousand dollars.

Witness the Honorably Melville W. Fuller, Chief Justice of the United States, this 16th day of September, in the year of [SEAL.] our Lord one thousand eight hundred and ninety-six, and of our Independence the 121st.

W. J. COSTIGAN, *Clerk.*

Memorandum Pursuant to Rule 12, *Rules of Practice for the Courts of Equity of the United States.*

You are hereby required to enter your appearance in the above suit on or before the first Monday of November next, at
9 the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken *pro confesso.*

W. J. COSTIGAN, *Clerk.*

(Endorsed.)

UNITED STATES MARSHAL'S OFFICE,
NORTHERN DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 28th day of September, 1896, and personally served the same, on the 28th day of September, 1896, on Florence Blythe Hinckley and Frederick W.

Hinckley, her husband, by delivering to and leaving with Florence Blythe Hinckley and Florence Blythe Hinckley, the wife of Frederick W. Hinckley, an adult person, who is a member in the family of Frederick W. Hinckley, said defendant named therein, at the city and county of San Francisco, in said district, an attested copy thereof, at the dwelling-house or usual place of abode of said Florence Blythe Hinckley, one of said defendants herein.

San Francisco, Oct. 1st, 1896.

BARRY BALDWIN,
U. S. Marshal,
By T. J. GALLAGHER, *Deputy.*

Subpœna ad respondendum. Filed October 2d, 1896. W. J. Costigan, clerk.

10 In the Circuit Court of the United States in and for the Northern District of California.

JOHN W. BLYTHE and HENRY T. BLYTHE, Complainants,
vs.
FLORENCE BLYTHE HINCKLEY, FREDERICK W. Hinckley, Her Husband, The Blythe Company, a Corporation, [and Boswell M. Blythe],* Defendants.
No. 12144.

W. J. C., clerk.

Second Amended and Supplemental Bill in Equity.

To the judges of the circuit court of the United States for the northern district of California:

John W. Blythe, of Fulton, and citizen of the State of Kentucky, and Henry T. Blythe, of Blythedale, and a citizen of the State of Arkansas, by leave of court first had and obtained, file this their second amended and supplemental bill in equity against Florence Blythe Hinckley and Frederick W. Hinckley, her husband, of San Francisco, and citizens of the State of California, and the Blythe Company, a corporation organized and existing under the laws of and a citizen of the State of California ["and Boswell M. Blythe, of Downey, and a citizen of the State of California"]*; and thereupon your orators complain and say—

W. J. C., clerk.

That on the 3rd day of December, 1895, they filed
11 their original bill herein against all these defendants except Boswell M. Blythe; which bill was in substance as follows:

That your orators were citizens and residents of the State of Kentucky and Arkansas respectively; that defendants each were then citizens of the State of California; that complainants were then the owners as tenants in common with each other of the lands therein described, which are the same lands hereinafter described; that said

[* Words and figures enclosed in brackets erased in copy.]

lands were of the value of $3,000,000 and upwards; that said defendants claimed to own adversely to complainants some estate, title, or interest in said land, but that said claims of said defendants were and are groundless and without warrant of law, and their claims to said lands were a cloud upon complainants' title thereto; and these complainants prayed that said defendants be required to set forth in this action by what rights and upon what grounds their said claims rested, and that it be finally adjudged herein that defendants nor either of them have any right or title to said lands or any part thereof, and that complainants' title thereto be adjudged good and valid as against defendants and each of them, and for such other judgment or relief as might be just, and that defendants, until the trial hereof, be restrained and enjoined from meddling or interfering with said lands or the rents and profits thereof, and for costs.

That on the 12th day of December, 1895, your orators, by leave of court first had and obtained, duly filed herein their amended bill, which amended bill differed from the original bill only in this, that it alleged that the defendant The Blythe Company was a
12 corporation organized and existing under the laws of the State of California and having its office and principal place of business at the city and county of San Francisco, in said State, and that each of defendants is a citizen of the State of California and is a resident of and now resides within the northern district of said State of California, and that at the time of the commencement of this suit neither one of the parties was in possession of said lands nor any part thereof. In other respects said amended bill was in substance the same as the original bill.

And by way of supplement to the original and amended bill, your orators say that the said Boswell M. Blythe is a citizen of the
the southern district of
W. J. C., clerk. State of California, residing at Downey, in A said State; and your orators further say that the said Boswell M. Blythe is one of the heirs-at-law of said Thomas H. Blythe, deceased, mentioned in the original and amended bills herein, and is entitled to have some share of the estate of said Thomas H. Blythe adjudged and decreed to him; that by reason of his citizenship he cannot join your orators as complainants
but as the said Boswell M. Blythe resides out of and beyond the jurisdiction of this court your orators state the facts concerning him
in this bill; A [but being a proper party, your orators therefore make him a defendant]*, to the end that his rights and interests may be protected and preserved by your honors upon the final decree; and your orators say that complainant John W. Blythe is a citizen and resident of the State of Kentucky, and complainant Henry T. Blythe is a citizen and resident of the State of Arkansas, and all the defendants named in this bill are respectively residents and citizens of the State of California.

And your orators say that Thomas H. Blythe died intestate in the city and county of San Francisco, State of California,
13 on the 4th day of April, 1883, being at and before the time of his death a citizen of the United States and of the State of

[* Words enclosed in brackets erased in copy.]

California and a resident of the city and county of San Francisco; that at and before the time of his death he was the owner in fee and seized and possessed of all the following-described real property, situated in the city and county of San Francisco, State of California, bounded and described as follows:

Beginning at a point on the southerly line of Geary street distant thirty feet and five inches westerly from the westerly line of Kearny street, thence southerly on a line at right angles to the said southerly line of Geary street fifty feet and three-fourths of one inch, more or less, to the northwesterly line of Market street; thence southwesterly along the said northwesterly line of Market street three hundred and eighty-four feet and ten and seven-eighths inches, more or less, to the northerly line of O'Farrell street; thence westerly along the said northerly line of O'Farrell street forty feet and one and one-half inches, more or less, to the easterly line of Dupont street; thence northerly along the said easterly line of Dupont street two hundred and five feet; thence at right angles easterly sixty feet; thence at right angles northerly twenty feet; thence at right angles westerly twenty feet; thence at right angles northerly fifty feet to the said southerly line of Geary street; thence easterly along the said southerly line of Geary street one hundred and thirty-five feet and six
14 inches; thence at right angles southerly seventy-four feet and six inches; thence at right angles westerly thirty feet; thence at right angles southerly three feet; thence at right angles easterly fifty feet and six inches; thence at right angles northerly seventy-seven feet and six inches to the said southerly line of Geary street, and thence easterly along the said southerly line of Geary street one hundred and fifty-six feet and six inches, more or less, to the point of beginning, being a portion of the block of land bounded by Kearny, Market, Dupont (Grant avenue), and Geary streets, all in the city and county of San Francisco, State of California.

And your orators further say that they and the said Boswell M. Blythe were and are the next of kin and heirs-at-law of said Thomas H. Blythe, deceased, and said John W. Blythe is the assignee of Elizabeth Shelton and William S. Blythe, other next of kin and heirs-at-law of said Thomas H. Blythe, deceased, and as such assignee he, said John W. Blythe, owns the interests to which they would have been entitled in the estate of said Thomas H. Blythe, deceased, and as such your orators were and are entitled to take and have by succession and they did take by succession the estate of said Thomas H. Blythe, deceased, and as such they are the owners in fee of the real property above described and entitled to the possession thereof.

And your orators say that defendant Florence was born in England, the bastard child of an unmarried woman. At the time of her birth her mother was a resident of England and a subject of Victoria, Queen of Great Britain and Ireland; that said Florence
15 was born a subject of Victoria, Queen of Great Britain and Ireland, and she remained in England at all times until after the death of said Thomas H. Blythe.

That one Joseph James Ashcroft and Julia, his wife, both

English subjects, domiciled and residing in England, after the birth of said Florence and prior to the death of Blythe, took said Florence, while still a young child, under the age of ten years, into their family and publicly held her out as their child.

That after the death of said Thomas H. Blythe, as hereinbefore alleged, the public administrator of the city and county of San Francisco took charge of the estate of said Blythe and entered upon the administration of the same.

That in the year 1883 the said Florence, for the first time, left England and came to San Francisco, she being then an infant about ten years old, who had never before been out of England, and who was then and there ineligible to become a citizen of the United States, and who was when she arrived in California a non-resident alien.

That the laws in force in the State of California in the year 1883, when the said Thomas H. Blythe died, relating to the rights of foreigners and aliens to take real estate by succession as heirs-at-law of a deceased citizen of the State of California were the treaty of 1794, between His Britannic Majesty and the United States, and the naturalization laws of the United States and section 17 of article I of the constitution of California, adopted in the — 1879, which said section 17 of article I was made mandatory and prohibitory by section 22 of article I of said constitution. When said constitution was adopted, and long prior thereto, there were in the Civil Code of California certain sections, namely, sections 671, 672, and 1404, relating to said subject, which last-named sections were and are contrary to and inconsistent with and in violation of said section 17 of article I of said constitution, and were by the provisions of said section 17 and section 22 of article I annulled and abrogated.

And your orators further say that there were at and for some time before the death of said Thomas H. Blythe certain laws in force in said State, to wit, sections 230 and 1387 of the Civil Code of California, providing for the adoption and legitimation and institution of heirship of illegitimate children; that said section 230 originated with the adoption of said Code; that said section 1387 has been substantially in force in the State of California since the year 1850, and had been many times construed and applied or held not to apply by the supreme court of California before the adoption of the said Civil Code, and that the construction of said law by the State supreme court became a rule of property in said State, and so remained and continued to be a rule of property from the year 1854 until it was attempted to be changed and abrogated by a decision of said supreme court, made in the year 1894.

That there was not at any time during the life of said Thomas H. Blythe any law in force in England under or by the force of which the said Blythe could have legitimated the said Florence or made her his heir-at-law, nor was there at any time during the life of said Blythe any law in force in England under or by the force of which he could have released or absolved the said Florence of and from her allegiance

to her sovereign, Queen Victoria, or, without bringing said Flor-
17 ence into California, changed her status from that of a subject of England to that of a *bona fide* resident of the State of California; that after the said Florence first came to San Francisco one James Crisp Perry, who was then and there a subject of the Queen of Great Britain, was appointed by said superior court of the city and county of San Francisco guardian of said Florence, and thereafter, as such guardian, he commenced a proceeding in said superior court in the name of said Florence to have the court ascertain, adjudge, and determine the heirship to the said Thomas H. Blythe and the ownership of his estate, and, in substance, that she, said Florence, was the daughter and the sole heir of said Thomas H. Blythe under and by virtue of said sections 230 and 1387 of said Civil Code or under and by virtue of one or the other of said sections, and also by virtue thereof to have the said court adjudge and decree that the said Florence was the sole heir-at-law of the said Thomas H. Blythe and entitled to inherit his estate; that your orators appeared in said action or proceedings and filed their answer [and
W. J. C., cross complaint]* therein denying and contesting the
clerk. right and title of said Florence and claiming for themselves to be heirs of said Blythe; that thereafter such proceedings were had in said court in the said cause that it was for the first time made to appear plainly to the court upon the record that said Florence was an illegitimate child; that she was born in England, and that neither she nor her alleged mother, nor the mother nor father of the alleged mother, had ever been within the United States or eligible to become
18 citizens thereof until after the death of the said Thomas H. Blythe; and your orators in that behalf allege that when it was so made plainly to appear to said court that the said Florence was a non-resident alien, and had never been a *bona fide* resident of the State of California until after the death of said Thomas H. Blythe and descent cast, it was the duty of said court to dismiss the petition or complaint, or both, of the said Florence, in so far as the title and descent of the above-described real estate was involved or affected for want of jurisdiction in said court to adjudge or decree that said Florence was capable of inheriting said real estate as an heir-at-law of said Thomas H. Blythe.

Your orators further say that in the said proceeding, wherein the said Florence was petitioner and plaintiff, it was at the trial thereof attempted to be proven by her and in her behalf that the said Thomas H. Blythe, after the birth of the said Florence, and before his death, and while he was living in the State of California, and while the said Florence was living in England, as aforesaid, attempted to legitimate the said Florence by adoption under said section 230 of the Civil Code, or to institute her as his heir under said section 1387 of said Code, and your orators say that the parties went to trial, and the said superior court, without jurisdiction so to do, decided, in substance and effect, that said Thomas H. Blythe had in his lifetime adopted

[* Words and figures enclosed in brackets erased in copy.]

and legitimated the said Florence; that from said judgment your orators appealed to the State supreme court, and in that court the cause was argued, and by a divided court it was, without any
19 jurisdiction so to do, in substance and effect, decided that the said Thomas H. Blythe had not adopted or legitimated the said Florence under or in conformity with said section 230 of the Civil Code, but that he had constituted her his heir under and pursuant to the provisions of section 1387 of said Civil Code.

And in that behalf your orators say that neither the said superior court nor the said supreme court considered, adjudged, or construed, in making its decision, the said section 17 of article I and said section 22 of article I of the constitution of the State of California; nor were the rights of your orators under those sections adjudged or determined by either of said courts or by its decision.

And in that behalf your orators say that said last decision so made by a divided court was and is contrary to and in violation of the constitution of the State of California, and was and is contrary to and in direct conflict with numerous former decisions of said supreme court, which former decisions had long before established a rule of property in said State, which rule had excluded aliens and foreigners who occupied the same or similar status as did said Florence, from inheriting real estate in the State of California.

And in that behalf your orators further say that they are informed and believe, and upon their information and belief say, that they are not precluded by the said conflicting decisions of the State court, nor by anything contained in the record of the proceedings upon which said last decision was made, from prosecuting this their action in this court, nor is this court precluded from enter-
20 taining jurisdiction of this action and deciding it upon its merits, nor is said last decision binding or obligatory as authority or otherwise upon this court.

And your orators further say that heretofore, to wit, on June 18, 1894, said Florence, calling herself Florence Blythe, filed in said superior court, in the matter of the estate of said Thomas H. Blythe, deceased, her petition for distribution, praying for an order of said court distributing to her the share of said estate to which she claimed to be entitled, to wit, the whole of said estate, embracing the real property first above described, to which she alleged herself to be entitled only as sole heir-at-law and sole next of kin to said Thomas H. Blythe, deceased.

That in her said petition it was made plainly to appear to said court that said Florence, the petitioner, was a non-resident alien, and was not and had never been a *bona fide* resident of the State of California until after the death of said Thomas H. Blythe and descent cast, and your orators say that it was the duty of said court to dismiss the said petition for distribution of said Florence, in so far as the title and descent of the above-described real estate was involved or affected, for want of jurisdiction in said court to adjudge or decree that said Florence was capable of inheriting said real estate as heir-at-law of said Thomas H. Blythe, or to distribute said estate to her.

That your orators answered said petition for distribution, and thereby took issue upon all the material averments thereof, and therein claimed said estate as heirs of said Blythe.

21 That afterwards the court, sitting in probate, without righ, or jurisdiction so to do, heard said petition for distribution and afterwards, on October 26, 1894, said court went through the idle form of granting a decree of distribution, and on that day a document which falsely purported to be a decree of distribution of nearly all the property of said estate of Thomas H. Blythe to said Florence, embracing all of the real property above described, was signed by the judge of said court and filed by the clerk and on the next day thereafter was recorded in the minute book of said court.

And your orators say that said pretended decree of distribution was and is null and void for want of jurisdiction in said court to make the same.

And your orators say that said Florence was born on or about the 18th day of December, 1873, and became of age, under the laws of California, on or about the 18th day of December, 1891.

And your orators say that on the 21st day of September, 1892, said Florence was married to defendant Frederick W. Hinckley and has taken the name of Florence Blythe Hinckley and she is sued herein under said name.

And your orators further say that heretofore and since the filing of the original bill herein, to wit, on January 2d, 1896, said Florence, calling herself Florence Blythe Hinckley, filed in said superior court in the matter of the estate of Thomas H. Blythe, deceased, her petition for final distribution to her of said estate, wherein and whereby she prayed for an order of said court distributing to her the

22 residue of said estate then remaining in the hands of the public administrator, amounting to the sum of $89,842.94, the same and the whole thereof being the rents accrued from the real property aforesaid, to which she alleged herself to be entitled only as the sole heir-at-law and sole next of kin to said Thomas H. Blythe, deceased.

That in her said petition it was made plainly to appear to said court that said Florence, the petitioner, was born and continued to be a non-resident alien until after the death of said Blythe, and was not and had never been a *bona fide* resident of the State of California until after the death of said Thomas H. Blythe and descent cast; and your orators say that it was the duty of said court to dismiss said petition for final distribution to said Florence, in so far as the above-described real estate and said rents were involved or affected, for want of jurisdiction in said court to adjudge or decree that said Florence was capable of inheriting said real estate as heir-at-law of said Thomas H. Blythe, deceased, or to distribute said estate to her.

That notice of said petition was given to your orators, who were notified and invited to come into court and show why said petition should not be granted.

That, in obedience and response to said notice, your orators did on January 16, 1896, file in said court their answer, wherein and

whereby they denied the right of the said Florence to have said rents distributed to her, and claimed that they were the heirs and next of kin of said Thomas H. Blythe, deceased, and entitled to said rents.

23 That afterwards, on the 16th day of January, 1896, said court sitting in probate, without right or jurisdiction so to do, heard said petition for final distribution and wrongfully struck from the files the answer and opposition so theretofore filed by your orators, and when your orators arose and attempted to object to and to show cause why said petition should not be granted, said court refused to permit your orators to be in anywise heard.

And afterwards, on January 18th, 1896, said court went through the idle form of granting a decree of final distribution, and on that day a document which falsely purported to be a decree of final distribution, distributing to said Florence all the residue of said estate, based upon said petition last aforesaid, was signed by the judge of said court and filed by the clerk, and the same was thereafter recorded in the minute book of said court.

And your orators say that said pretended decree of final distribution was and is null and void for want of jurisdiction in said court to make the same.

And your orators further say that at the date of filing the original bill herein neither party hereto was in possession of the land hereinbefore described, but the same was in the hands and possession of the public administrator of the city and county of San Francisco, State of California.

But since the filing of said bill, to wit, December 4, 1895, said Florence has secured possession of said real property and the whole thereof through said pretended judgment and decrees afore-

24 said, and without any other or further right than as above set forth, and she is now in the possession of the same.

That said real property is all of it built upon, being covered with stores and tenements which are much used and in great demand as places of business, and which are all occupied by tenants and bring in a monthly rental of about twelve thousand dollars, which said Florence receives each month without any just and lawful right so to do.

That said Florence has no property; that she is and will continue to be insolvent and largely indebted, to wit, in the sum of $500,000 and upwards, and wholly unable to account for and restore said rents and income received and which she will continue to receive, to said estate or to your orators.

And your orators say that the real property the subject of this action is of the value of upwards of three millions of dollars.

And defendants claim some right or title to said land and property adverse to your orators, which claim, except as to the said nominal defendant, Boswell M. Blythe, is false and groundless and a cloud upon your orators' title.

Wherefore, in consideration of the premises and inasmuch as your orators are remediless at law and can have no adequate relief save in a court of equity, where matters of this and the like nature are

properly cognizable and relievable, and to the end that the respondents may appear and answer all and singular the matters and things hereinbefore in this their amended and supplemental bill complained of, but without oath to their several answers, your
25 orators expressly waiving the oath of each of the respondents to his or her answer hereto, your orators pray your honors to order, adjudge, and decree that your orators and the assigns of your orators were, at the time of the death of the said Thomas H. Blythe, and now are, the heirs-at-law of the said Thomas H. Blythe, and as such heirs did inherit and were and are entitled to inherit the said above-described real estate from said Thomas H. Blythe.

That neither of the defendants to this bill, excepting said nominal defendant, Boswell M. Blythe, now have or ever had any right, title, or interest in or to the said above-described real estate as heirs-at-law of the said Thomas H. Blythe or otherwise.

That the title of your orators to said real estate be quieted in and by the decree of your honors, and that they be let into possession thereof.

That as to the said Florence Blythe Hinckley and the said Frederick W. Hinckley, her husband, an account of the rents and profits which have been received or which may hereafter be received up to the final hearing by the said Florence Blythe Hinckley or of any one claiming under her be taken, and that upon the coming in of the report of the value thereof and the confirmation of said report be adjudged and decreed to your orators.

And your orators pray for such other and further and particular relief as to your honors may seem meet and proper; that your honors appoint a receiver herein to take possession of the said above real estate, and to hold the same pending this action,
26 and to collect the rents and profits of said real estate, and to manage the same under such particular or general orders as your honors may give and direct.

And your orators pray for general relief and for their costs.

S. W. & E. B. HOLLADAY,
Solicitors for Complainants.

L. D. McKISICK,
Counsel for Complain-ts.
CHANDLER, HOLLADAY & CONROY,
Of Counsel for Complainants.

(Endorsed:) Received a copy of the within second amended and supplemental bill this 14th day of January, 1897. Wm. H. H. Hart, solicitors for defendants Hinckley. Geo. W. Towle, Jr., att'y for defendant The Blythe Company. Second amended and supplemental bill in equity. Filed Jan. 14th, 1897. W. J. Costigan, clerk, by W. B. Beaizley, dep. clerk.

27 In the Circuit Court of the United States in and for the Northern District of California.

JOHN W. BLYTHE and HENRY T. BLYTHE, Complainants,
vs.
FLORENCE BLYTHE HINCKLEY, FREDERICK W. Hinckley, Her Husband, The Blythe Company, a Corporation, and Boswell M. Blythe, Defendants.
} No. 12144. In Equity.

Notice of Motion for an Order of Court Dismissing Suit.

To said complainants and S. W. & E. B. Holladay, solicitors for said complainants, and to the defendant The Blythe Company and to George W. Towle, Jr., its solicitor:

You and each of you are hereby notified that said defendant, Florence Blythe Hinckley, will move the court on Monday, March 1st, 1897, at 11 o'clock a. m., or as soon thereafter as counsel can be heard, at the court-room of said court, in the Appraisers' building, in said city and county of San Francisco, State of California, for an order of said honorable court dismissing said suit, and which motion will be made upon the following grounds, to wit:

1st. That, as appears from the second amended and supplemental bill of complaint of complainants filed in the above-entitled
28 suit, this honorable court has no jurisdiction of the matters and things in the alleged cause of action in said second amended and supplemental bill of complaint stated.

2d. That, as appears from the said second amended and supplemental bill of complaint of complainants filed in the above-entitled suit, all the parties on one side of the controversy involved in this suit are not citizens of different States, nor of a different State, from all those upon the other side of said controversy.

3d. That in said second amended and supplemental bill of complaint the citizenship of the parties thereto is averred, and it appears therefrom that Boswell M. Blythe, who is made a party thereto and is named as a defendant therein, is a citizen of the same State of which this defendant Florence Blythe Hinckley is a citizen, to wit, of the State of California; and it further appears from said second amended and supplemental bill of complaint that said Boswell M. Blythe is interested wholly on the same side of the controversy in this suit with the complainants herein, and is to be arranged and regarded as one of the complainants in this suit in determining the question of jurisdiction, and his citizenship being that of the same State as that of the defendant Florence Blythe Hinckley, this honorable court has not jurisdiction of this suit.

Upon the hearing of said motion this defendant will rely on the papers, pleadings, files, records, and proceedings on file and of record in said suit, and particularly upon the said second amended
29 and supplemental bill of complaint filed herein, and this notice of motion.

Wherefore said defendant prays that said suit be dismissed.

WM. H. H. HART,
Solicitor for the Defendant Florence Blythe Hinckley.

GARBER, BOALT & BISHOP &
W. W. FOOTE,
Of Counsel for the Defendant Florence Blythe Hinckley.

(Endorsed:) Service of the within by copy admitted this 15th day of February, 1897. S. W. & E. B. Holladay, solicitors for complainants. Notice of motion for an order of court dismissing suit. Filed February 15, 1897. W. J. Costigan, clerk, by W. B. Beaizley deputy clerk.

30 In the Circuit Court of the United States, Northern District of California.

JOHN W. BLYTHE ET AL.
vs.
FLORENCE BLYTHE HINCKLEY ET AL. } 12144.

Order Dismissing Action as to Defendant The Blythe Co.

Now, this day, the complainants in the above entitled and numbered action having come into open court and moved the court to be allowed to dismiss their bill herein as to and against the Blythe Company, named as one of the defendants herein, and to discontinue this suit as to said defendant;

And it appearing that no decretal order or decree has been made herein affecting said defendant in any manner whatever—

It is ordered that said motion be granted, and it is adjudged and decreed that this action be discontinued as to and against The Blythe Company, defendant, on payment by complainants of said defendant's costs heretofore accruing.

Dated Feb. 26, 1897.

WM. W. MORROW,
District Judge.

(Endorsed:) Order discontinuing action as to The Blythe Co., defendant. Filed & entered Feb'y 26th, 1897. W. J. Costigan, clerk.

31 In the Circuit Court of the Northern District of California.

JOHN W. BLYTHE ET AL., Complainants,
vs.
FLORENCE BLYTHE HINCKLEY and BOSWELL M. Blythe *et al.*, Defendants. } No. 12144.

Order Amending Second Amended & Supplemental Bill & Dismissing Cause as to Boswell M. Blythe.

On motion, made this day, in open court, by the solicitors for complainants, for leave to strike out the name of Boswell M. Blythe

from the caption and title of the cause in the amended and supplemental bill filed herein on the 4th day of January, 1897, and for leave to amend said bill by striking out the words on lines 27 and 28 on page 1, "and Boswell M. Blythe, of Downey, and a citizen of the State of California;" and to amend said bill, line 15, page 3, by inserting after the words "Downey in" by adding and inserting the words "the southern district of" before the word "said," in line 15, page 3; and to amend said bill, line 22, page 3, by striking out after the word "bill" the words "but being a proper party, your orators therefore make him a defendant," line 23, and by inserting after the said word "defendant," line 23, page 3, and before the words "to the end," the following, "but as the said Boswell M. Blythe resides out of and beyond the jurisdiction of this court, your orators state the facts concerning him," and line 27, page 8, strike the words "and cross-complaint," and for leave to dismiss said amended and supplemental bill as to the said Boswell M. Blythe without prejudice--

The court, having heard and considered said motions, granted the same and each of them, and it is hereby ordered and directed that the clerk of this court amend the said bill by erasing and striking from the caption and title of the cause the name of Boswell M. Blythe, and by striking out and erasing the words "and Boswell M. Blythe, of Downey, and a citizen of the State of California," on lines 27 and 28, page 1, of the bill, by running his pen with red ink through said words, and that he add and insert after the words "Downey in," line 15, page 3, the words "the southern district of," and that he erase and strike out after the word "bill," line 22, page 3, the words "but, being a proper party, your orators therefore make him a defendant," by running his pen with red ink through said words, and that after the said word "defendant" and before the words "to the end," line 23, page 3, he insert the words following: "but as the said Boswell M. Blythe resides out of and beyond the jurisdiction of this court, your orators state the facts concerning him," and in line 27, page 8, strike out the words "and cross-complaint."

And it is further ordered that said amended and supplemental bill so amended as aforesaid be, and the same is hereby, dismissed as to and against the said Boswell M. Blythe without prejudice, and the clerk is hereby directed to enter an order on the minutes dismissing the bill without prejudice as to said Boswell M. Blythe and note the same on the rule docket of the court.

WM. W. MORROW, *Judge.*

Dated June 1st, 1897.

(Endorsed:) Amendments. Filed June 1st, 1897. W. J. Costigan, clerk.

33 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

JOHN W. BLYTHE ET AL., Complainants,
vs.
FLORENCE BLYTHE HINCKLEY ET AL. } No. 12144.

Opinion on Motion to Dismiss.

S. W. & E. B. Holladay, attorneys for complainants; L. D. McKisick and Jefferson Chandler, of counsel.

W. H. H. Hart, attorney for the defendant Florence Blythe Hinckley; Garber, Boalt & Bishop, W. W. Foote, Aylett R. Cotton, and Robert Y. Hayne, of counsel.

George W. Towle, Jr., attorney for the defendant The Blythe Company; E. S. Pillsbury and Lorenzo S. B. Sawyer, of counsel.

MORROW, *Circuit Judge:*

This is a motion to dismiss the action as it is set forth in the second amended and supplemental bill of complaint. The first ground of the motion is that it appears that the court has no jurisdiction of the matters and things alleged in the bill of complaint. A preliminary objection has been interposed to the consideration of the question of jurisdiction on this motion. The objection must be overruled. Section 5 of the act of March 3, 1875 (18 Stat., 472), imposes upon the circuit court the duty of dismissing a suit if it
34 appears at any time after it is brought, and before it is finally disposed of, that it does not really and substantially involve a controversy of which it may properly take cognizance (Robinson *v.* Anderson, 121 U. S., 522; Morris *v.* Gilmer, 129 U. S., 315).

The second amended and supplemental bill of complaint contains a recital of the proceedings in the superior court of the city and county of San Francisco with respect to the estate of Thomas H. Blythe, deceased. It alleges, among other things, that the defendant Florence Blythe Hinckley was born in England, the bastard child of an unmarried woman; that at the time of her birth her mother was a resident of England and a subject of Victoria, Queen of Great Britain and Ireland; that she remained in England at all times until the death of Thomas H. Blythe; that she came to California for the first time in 1883; that she was then an infant about ten years of age, ineligible to become a citizen of the United States, and when she arrived in California she was a non-resident alien; and, among other things, the bill alleges:

That after the death of said Thomas H. Blythe, as hereinbefore alleged, the public administrator of the city and county of San Francisco took charge of the estate of said Blythe and entered upon the administration of the same. * * *

That after the said Florence first came to San Francisco one James Crisp Perry, who was then and there a subject of the Queen of Great Britain, was appointed by said superior court of the city and

county of San Francisco guardian of said Florence, and there-
35 after, as such guardian, he commenced a proceeding in said superior court, in the name of said Florence, to have the court ascertain, adjudge, and determine the heirship to the said Thomas H. Blythe and the ownership of his estate, and in substance that she, said Florence, was the daughter and the sole heir of said Thomas H. Blythe under and by virtue of said sections 230 and 1387 of said Civil Code or under and by virtue of one or the other of said sections, and also by virtue thereof to have the said court adjudge and decree that the said Florence was the sole heir-at-law of the said Thomas H. Blythe and entitled to inherit his estate; that your orators appeared in said action or proceeding and filed their answer and cross-complaint therein, denying and contesting the right and title of said Florence and claiming for themselves to be heirs of said Blythe; that thereafter such proceedings were had in said court in the said cause that it was for the first time made to appear plainly to the court, upon the record, that said Florence was an illegitimate child, that she was born in England, and that neither she nor her alleged mother, nor the mother nor father of the alleged mother, had ever been within the United States or eligible to become citizens thereof until after the death of the said Thomas H. Blythe; and your orators in that behalf allege that when it was so made plainly to appear to said court that the said Florence was a non-resident alien and had never been a *bona fide* resident of the State of California until after the death of said Thomas H. Blythe and descent cast it was the duty of the court to dismiss the petition or complaint, or both, of the said
36 Florence, in so far as the title and descent of the above-described real estate was involved or affected, for want of jurisdiction in said court to adjudge or decree that said Florence was incapable of inheriting said real estate as an heir-at-law of said Thomas H. Blythe.

Your orators further say that in the said proceeding wherein the said Florence was petitioner and plaintiff it was at the trial thereof attempted to be proven by her and in her behalf that the said Thomas H. Blythe, after the birth of the said Florence and before his death, and while he was living in the State of California, and while the said Florence was living in England, as aforesaid, attempted to legitimate the said Florence by adoption under said section 230 of the Civil Code, or to institute her as his heir under said section 1387 of said code; and your orators say that the parties went to trial, and the said superior court, without jurisdiction so to do, decided in substance and effect that said Thomas H. Blythe had in his lifetime adopted and legitimated the said Florence; that from said judgment your orators appealed to the State supreme court, and in that court the cause was argued and by a divided court it was, without any jurisdiction so to do, in substance and effect decided that said Thomas H. Blythe had not adopted or legitimated the said Florence under or in conformity with said section 230 of the Civil Code, but that he had constituted her his heir under and pursuant to the provisions of section 1387 of said Civil Code.

And in that behalf your orators say that neither the said
37 superior nor the said supreme court considered, adjudged, or construed in making its decision the said section 17 of article I and said section 22 of article I of the constitution of the State of California, nor were the rights of your orators under those sections adjudged or determined by either of said courts or by its decision.

And in that behalf your orators say that said last decision made by a divided court was and is contrary to and in violation of the constitution of the State of California, and was and is contrary to and in direct conflict with numerous former decisions of said supreme court, which former decisions had long before established a rule of property in said State, which rule had excluded aliens and foreigners who occupied the same or similar status as did said Florence, from inheriting real estate in the State of California.

And in that behalf your orators further say that they are informed and believe, and upon their information and belief say, that they are not precluded by the said conflicting decisions of the State court, nor by anything contained in the record of the proceedings upon which said last decision was made, from prosecuting this their action in this court, nor is this court precluded from entertaining jurisdiction of this action and deciding it upon its merits, nor is said last decision binding or obligatory as authority or otherwise upon this court.

And your orators further say that heretofore, to wit, on June 18, 1894, said Florence, calling herself Florence Blythe, filed in said
38 superior court, in the matter of the estate of said Thomas H. Blythe, deceased, her petition for distribution praying for an order of said court distributing to her the share of said estate to which she claimed to be entitled, to wit, the whole of said estate, embracing the real property first above described, to which she alleged herself to be entitled only as sole heir-at-law and sole next of kin to said Thomas H. Blythe, deceased.

That in her said petition it was made plainly to appear to said court that said Florence, the petitioner, was a non-resident alien, and was not and had never been a *bona fide* resident of the State of California until after the death of said Thomas H. Blythe and descent cast, and your orators say that it was the duty of said court to dismiss the said petition for distribution of said Florence in so far as the title and descent of the above-described real estate was involved or affected for want of jurisdiction in said court to adjudge or decree that said Florence was capable of inheriting said real estate as heir-at-law of said Thomas H. Blythe or to distribute said estate to her.

That your orators answered said petition for distribution, and thereby took issue upon all the material averments thereof, and therein claimed said estate as heirs of said Blythe.

That afterwards the court, sitting in probate, without right or jurisdiction so to do, heard said petition for distribution, and afterwards, on October 26, 1894, said court went through the idle form of granting a decree of distribution, and on that day a document,

which falsely purported to be a decree of distribution of
39 nearly all the property of said estate of Thomas H. Blythe to said Florence, embracing all of the real property above described, was signed by the judge of said court and filed by the clerk, and on the next day thereafter was recorded in the minute book of said court.

And your orators say that said pretended decree of distribution was and is null and void for want of jurisdiction in said court to make the same. * * *

And your orators further say that heretofore and since the filing of the original bill herein, to wit, on January 2d, 1896, said Florence, calling herself Florence Blythe Hinckley, filed in said superior court, in the matter of the estate of Thomas H. Blythe, deceased, her petition for final distribution to her of said estate, wherein and whereby she prayed for an order of said court distributing to her the residue of said estate, then remaining in the hands of the public administrator, amounting to the sum of $89,842.94, the same and the whole thereof being the rents accrued from the real property aforesaid, to which she alleged herself to be entitled only as the sole heir-at-law and sole next of kin to said Thomas H. Blythe, deceased.

That in her said petition it was made plainly to appear to said court that said Florence, the petitioner, was born and continued to be a non-resident alien until after the death of said Blythe, and was not and had never been a *bona fide* resident of the State of California until after the death of said Thomas H. Blythe and descent cast; and your orators say that it was the duty of said court to dismiss said petition for final distribution to said Florence in so far
40 as the above-described real estate and said rents were involved or affected for want of jurisdiction in said court to adjudge or decree that said Florence was capable of inheriting said real estate as heir-at-law of said Thomas H. Blythe, deceased, or to distribute said estate to her.

That notice of said petition was given to your orators, who were notified and invited to come into court and show why said petition should not be granted.

That in obedience and response to said notice your orators did on January 16, 1896, file in said court their answer, wherein and whereby they denied the right of the said Florence to have said rents distributed to her and claimed that they were the heirs and next of kin of said Thomas H. Blythe, deceased, and entitled to said rents.

That afterwards, on the 16th day of January, 1896, said court sitting in probate, without right or jurisdiction so to do, heard said petition for final distribution and wrongfully struck from the files the answer and opposition so theretofore filed by your orators, and when your orators arose and attempted to object to and to show cause why said petition should not be granted said court refused to permit your orators to be in anywise heard.

And afterwards, on January 18th, 1896, said court went through the idle form of granting a decree of final distribution, and on that day a document which falsely purported to be a decree of final dis-

tribution, distributing to said Florence all the residue of said estate, based upon said petition last aforesaid, was signed by the
41 judge of said court and filed by the clerk, and the same was thereafter recorded in the minute book of said court.

And your orators say that said pretended decree of final distribution was and is null and void for want of jurisdiction in said court to make the same.

And your orators further say that at the date of filing the original bill herein neither party hereto was in possession of the land hereinbefore described, but the same was in the hands and possession of the public administrator of the city and county of San Francisco, State of California.

But since the filing of said bill, to wit, December 4, 1895, said Florence has secured possession of said real property and the whole thereof, through said pretended judgment and decree aforesaid, and without any other or further right than as above set forth, and she is now in the possession of the same. * * *"

It will be observed that the bill charges that the proceedings in the superior court of San Francisco and in the supreme court of the State respecting the right of the defendant Florence Blythe Hinckley to inherit the estate of Thomas H. Blythe, deceased, were without jurisdiction in either court to adjudge or determine. This charge of want of jurisdiction in the State court appears to be a conclusion drawn from the averments of the bill and must be disregarded unless the facts alleged are sufficient to support the charge. It is based primarily upon the alleged want of capacity on the part of the defendant Florence Blythe Hinckley to inherit the
42 estate of Thomas H. Blythe, by reason of the fact that she was an illegitimate child and an alien at the time of his death; but it is contended, further, that the State court, in adjudging that she had the capacity to inherit, destroyed a rule of property in the State after the estate had vested by descent in complainants. Upon this claim the complainants insist that they are entitled to maintain this action to recover their several interests in an estate in which they allege the defendants are in possession of under a void judgment.

The first inquiry is as to the jurisdiction of the State court to hear and determine the controversy as to the right of inheritance and the conclusive character of the judgment of that court between the same parties in the present action.

In the Broderick will case, 21 Wall., 503, a suit in equity was brought in the circuit court of the United States for the district of California by the alleged heirs-at-law of David C. Broderick to set aside the probate of his will and have the same declared a forgery and to recover the said estate, much of which consisted of lands in the city of San Francisco. Demurrers were interposed, and upon argument the bill was dismissed. An appeal was taken to the supreme court, where the decree was affirmed. In speaking of the jurisdiction of the probate courts the court said: "The public interest requires that the estates of deceased persons, being deprived of a master and subject to all manner of claims, should

at once devolve to a new and competent ownership, and consequently that there should be some convenient jurisdiction and
43 mode of proceeding by which this devolution may be effected with the last chance of injustice and fraud, and that the result attained should be firm and perpetual. The courts invested with this jurisdiction should have ample powers both of process and investigation, and sufficient opportunity should be given to check and revise proceedings tainted with mistake, fraud, or illegality. These objects are generally accomplished by the constitution and powers which are given to the probate courts and the modes provided for reviewing their proceedings; and one of the principal reasons assigned by the equity courts for not entertaining bills on questions of probate is that the probate courts themselves have all the powers and machinery necessary to give full and adequate relief." After reviewing the authorities establishing the general rule that a court of equity will not interfere with probate proceedings, the court proceeds to consider the jurisdiction of the probate courts of California, and concludes with this observation "In view of these provisions, it is difficult to conceive of a more complete and effective probate jurisdiction or one better calculated to attain the ends of justice and truth."

Under the present constitution of the State of California jurisdiction of all matters of probate is vested in the superior court, a court of general jurisdiction.

In Simmons *v.* Saul, 138 U. S., 439, a bill in equity was brought in the circuit court of the United States for the eastern district of Pennsylvania. The object of the bill was to charge the defendant as the former owner of a tract of land in Wisconsin, as the trus-
44 tee for complainants with respect to said ownership, and have him account for the value of the lands, and for all the rents and profits received by him and his grantees, and for all loss and damage resulting to the property by reason of the cutting of timber thereon by the defendant and his grantee, and for any other loss occasioned by the defendant's acts.

The complainants were the collateral heirs of Robert M. Simmons who died unmarried and intestate in Louisiana about the year 1830. At the time of his death he was seized and possessed of an inchoate land claim in Louisiana for 640 acres, founded upon a purchase of a settlement right conferred by an act of Congress. For reasons involving no fault on the part of Robert M. Simmons or any of his heirs the claim remained unlocated and unsatisfied until Congress passed an act in 1858, under which the surveyor general of the district in which the claim was situated was authorized, upon satisfactory proofs, to issue to the claimants or his legal representatives a certificate of location for a quantity of land equal to that so confirmed and unsatisfied, and it was provided that this certificate might be located upon any of the public lands of the United States subject to sale at private entry, etc. By the law of Louisiana the heirs of a decedent become seized and possessed of his whole estate, both real and personal, immediately upon his death, subject only to their right to renounce said succession or to the right of creditors to re-

quire administration thereof in case of non-action of the heirs. In 1872 such action was taken in a parish court in Louisiana at the
45 instance of a stranger to the estate that the judge of the court issued an order purporting to appoint an administrator of the estate of Robert M. Simmons, directing an inventory of the estate to be made and a sale of the property belonging thereto to pay debts. An inventory was returned and a sale of the land claim made in accordance with the order. The claim was sold for $30, which sum was wholly used and expended in the payment of the costs and expenses of the pretended administration, no other debts than those created thereby existing or being shown to exist. This claim was thereupon presented to the surveyor general of Louisiana by the purchaser claiming to be the legal representative of Robert M. Simmons, and the surveyor general thereupon prepared certificates of location for the claim, and in the course of proceedings authorized by the act of Congress certain of the certificates were located upon lands in Wisconsin and a patent therefor issued by the United States in the name of Robert M. Simmons or his legal representative. By several mesne conveyances the lands in question passed to the defendant, who neglected to pay the taxes assessed thereon, and the lands were conveyed for the unpaid taxes; but while the defendant was in possession of the land he removed therefrom timber and other valuable products and sold the same for large sums of money and received large rents and profits from the lands, which it was the object of the bill to recover. All the proceedings in relation to the claim in suit, the cutting of the timber, and all other acts in anywise connected with the claim were done and had without the knowledge or the complainants or of any person interested in the claim. The bill alleged that the
46 Louisiana court was without jurisdiction, and that its proceedings in the matter did not conform to the statute under the authority of which it assumed to act, and the prayer of the bill was that complainants might be adjudged and decreed to be the true legal representatives of Robert M. Simmons; that the proceedings in the parish court in relation to the sale of the land claims be adjudged null and void, and that an account be taken, etc.

The defendant demurred to the bill, the demurrer was sustained, and the bill dismissed. An appeal was taken to the Supreme Court, where the judgment of dismissal was affirmed. The questions discussed in the opinion of the court were the validity of the judgment of the parish court of Louisiana ordering the sale of the unlocated land claim, the legality of the sale and the fraud by which it was alleged the judgment was procured. The court reviews the authorities upon the questions involved in the case and arrives at the conclusion that the parish court had a clear and unquestionable jurisdiction of the intestate estate or succession of Robert M. Simmons; that whatever errors there were in the proceedings could have been corrected on appeal or avoided in a direct action of annulment, but could not be made the grounds on which the decree of the court could be collaterally assailed.

In Little Rock Junction Railway Co. *v.* Burke, 66 Fed., 83, the

complainant, claiming to be the owner by inheritance of a lot of land in the city of Little Rock, Arkansas, filed a bill of complaint against the Little Rock Junction railway to establish his title thereto and to recover the premises from the possession
47 of the defendant. The bill averred in substance that the railway company was in possession of the land under a conveyance from one S., who claimed to have purchased the property at a sale for overdue taxes, which sale had been made in obedience to a decree of a State court of Arkansas in Pulaski county, having full chancery powers; that the title thus acquired by the railway company from S., its grantor, was unfounded and void for the reason that the court never, in fact, acquired jurisdiction over the complainant to condemn and sell the property for overdue taxes; that service of process was by publication, and that notice was not properly given. The defendant denied the material allegations of the bill touching the jurisdiction of the chancery court and averred that said court acquired full jurisdiction of the case and of all persons having any interest in the property. The defendants also pleaded that the case made by the bill of complaint was not a case of which the Federal circuit court, sitting in equity, could properly take cognizance. The circuit court rendered a decree in favor of the complainant whereby it adjudged that his title was not divested by the sale under the decree of the State court. On appeal to the circuit court of appeals, the decree of the circuit court was reversed and the cause remanded, with directions to the circuit court to vacate its decree and dismiss the bill of complaint without prejudice to the complainant's right to take such action in the State court as he might deem proper. Judge Thayer, speaking for the circuit court of appeals and referring to the testimony introduced in the circuit court relating to the publication of notice of the suit in the State court, said "that the trial of the case
48 clearly resolved itself into a review of the proceedings of Pulaski chancery court for matters apparent on the face of the record." After pointing out the various proceedings that might have been taken by the complainant in the State court to correct the error of the chancery court, Judge Thayer said: "We think, therefore, that it may be accepted as a general rule, in the absence of any statutory provisions on the subject, that the proper forum in which to seek relief, otherwise than by an appeal or writ of error, against a judgment or decree which is alleged to be void on the face of the record, is in the court by which such judgment or decree was rendered, and that other courts of co-ordinate jurisdiction have no authority to grant relief in such cases. But, whatever may be the correct rule in this respect as between State courts of equal authority, it is manifestly true, we think, that, owing to the peculiar relations which exist between State and Federal courts of co-ordinate jurisdiction, the Federal circuit court ought not to review, modify, or annul a judgment or decree of a State court, unless such review is sought on a state of facts not disclosed by the record of the State court, which, for that reason, has not undergone judicial examination. The sufficiency of the service, whether by publication or

otherwise, to support a final adjudication, and every other matter apparent upon the face of the record, are supposed to have received due consideration by the court rendering a judgment or decree before the same was entered. Therefore, when a suit is instituted to nullify a decree for matters disclosed by the record, and for no other
49 reason, the proceeding is not a new suit, but is essentially in the nature of an appeal from the original adjudication or a bill of review. The Federal courts should remit proceedings such as these to the judicial tribunal of the State which made the record that is to be reviewed or impeached."

Reference is then made to the fact that the bill had been brought to quiet complainant's title against the claims of the defendant, and that the prayer of the bill was that the complainant might be restored to the possession of the premises wrongfully withheld from him by the defendant, and that the bill was filed after the alleged void decree of the chancery court was fully executed and after the defendant had acquired a title thereunder. Commenting upon this feature of the case, the court does not find in it a sufficient reason for holding that the circuit court was authorized to review the proceedings of the chancery court and to afford relief on the ground that the complaint was without means of redress for the alleged wrong in the State court, by which the supposed void decree was rendered, the court holding that not only was the bill of review open to the complainant as a remedy, but the action of ejectment, and upon this point the court says: "Moreover, as the present action was brought and prosecuted upon the theory that the decree of the chancery court is utterly void when tried by the record, it follows that the remedy by ejectment was also open to the complainant, for no doctrine is better established than that a sale under a decree that was rendered without jurisdiction confers no title, and that such a decree is open to impeachment in any collateral proceeding
50 when the want of jurisdiction is apparent upon the face of the record" (citing Galpin *v.* Page, 18 Wall., 350; Coit *v.* Haven, 30 Conn., 190; Adams *v.* Cowles, 95 Mo., 501; 8 S. W., 711; Frankel *v.* Satterfield (Del. Super.), 19 Atl., 898; Furgeson *v.* Jones (Or.), 20 Pac., 842; Black Judgm., secs. 278, 407, and cases there cited). Judge Sanborn concurred specially in the judgment of the circuit court of appeals on the ground that "a bill of equity cannot be maintained in the national courts to recover possession of real property in cases in which there is no impediment to an action of ejectment."

In Barrow *v.* Hunton, 99 U. S., 80, the Supreme Court draws a distinction between a suit to set aside a decree on evidence outside of the record establishing fraud in obtaining the decree and a proceeding to vacate a judgment for matters disclosed upon the face of the record. In that case Hunton had recovered a judgment by default in a State court of Louisiana. Subsequently the judgment debtor filed a petition in the State court praying for a decree to nullify the judgment on the ground that he had not been lawfully served with process. Hunton caused the proceedings to nullify the judgment to be removed to the circuit court of the United States,

where the question arose whether the Federal court could lawfully entertain jurisdiction of the proceedings. In discussing that question Mr. Justice Bradley, in delivering the opinion of the court, said: "The question presented with regard to the jurisdiction of the circuit court is whether the proceeding to procure (the) nullity of the former judgment in such a case as
51 the present is or is not in its nature a separate suit, or whether it is a supplementary proceeding, so connected with the original suit as to form an incident to it, and substantially a continuation of it. If the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or appeal, it would belong to the latter category and the United States court could not properly entertain jurisdiction of the case; otherwise the circuit courts of the United States would become invested with power to control the proceedings in the State courts, or would have appellate jurisdiction over them in all cases where the parties are citizens of different States. Such a result would be totally inadmissible. On the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding, and according to the doctrine laid down in Gaines *v.* Fuentes, 92 U. S., 10, the case might be within the cognizance of the Federal courts. The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist. In the one class there would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the State courts, and in the other class the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or of the party's right to claim any benefit by reason thereof."

52 These cases clearly establish the doctrine that the courts of the United States will not take jurisdiction of a case to correct an error appearing on the face of the record in a judgment rendered in a State court, nor will it take jurisdiction of a case the object of which is to set aside a judgment of a State court void upon its face. Now, if we examine the present bill, we find that the latter object is its substantial scope and purpose, and to accomplish this object there is set forth, with great particularity, the record and proceedings in the superior and supreme courts of the State in a controversy between the same parties, concerning the same subject-matter, together with references to the treaty of 1794 between Great Britain and the United States, sections of the constitution of the State and sections of the Civil Code of California, relating to the rights of foreigners and aliens to take real estate by succession as heirs-at-law of deceased citizens of California, and the question arises whether, upon that record, the contention of the complainants takes the case out of the general rule limiting the jurisdiction of the circuit court to interfere in such cases. This contention, fully stated, is: First, that the State court had no jurisdiction to award the estate of Thomas H. Blythe to a non-resident alien, who was ineli-

gible to become a naturalized citizen of the United States; second, that under a settled rule of property in existence in this State at the death of Thomas H. Blythe, and descent cast, the complainants were his heirs-at-law and the title to the real estate vested in them *eo instante* on the death of Blythe, and no court could afterwards divest that title and vest it in another; third, that this
53 court is not precluded by the decision of the State supreme court in 1892 in the case of Blythe *v.* Ayres (96 Cal., 552).

The claim that the superior court of the State had no jurisdiction to award the estate of Thomas H. Blythe to the defendant Florence Blythe Hinckley, because at his death she was a non-resident alien and ineligible to become a naturalized citizen of the United States, appears to involve a Federal question, for the reason that the ineligibility of a non-resident alien to inherit real property in any of the States of the Union may be a matter of treaty regulation between the Federal Government and foreign powers, and the States are forbidden to enter into any treaty stipulations, but the complainants do not contend for jurisdiction in the circuit on that ground. Moreover, the tribunal to review the decision of a State court involving such a question would be the Supreme Court of the United States, and that court has determined that it has no jurisdiction for that purpose in this case (Blythe *v.* Hinckley, 167 U. S., 746). This necessarily leaves the question of inheritance to be determined by the State law and by the State courts. The novel doctrine that, in the absence of treaty regulations upon the subject, the right of an alien to inherit does not exist, and that the courts of the State, otherwise competent to pass upon this question, are without jurisdiction, cannot be entertained at this period of our judicial history. Some consideration must be given to the fact that heretofore this whole question of inheritance has by judicial acquiescence been left to the jurisdiction of the States and has become a general rule of property right.

54 This being so, it follows that the jurisdiction of the circuit court cannot be maintained because the State court, in the exercise of its general jurisdiction, determined the ineligibility of the defendant Florence to inherit an estate which that court was called upon to distribute under the laws of the State.

The other propositions contended for by complainants are for the same reason deemed insufficient to take this case out of the general rule that after a court of a State, with full jurisdiction over property in its possession, has finally determined all rights to that property, a court of the United States will not entertain jurisdiction to annul such decree and disturb rights once definitely determined.

But there is still another reason why this action cannot be maintained. It appears from the bill of complaint that when the original bill was filed on December 3, 1895, neither party was in possession of the land in controversy, but that it was in the hands of the public administrator of the city and county of San Francisco.

Section 738 of the Code of Civil Procedure of California provides that "An action may be brought by any person against another

who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

In Holland *v.* Challen, 110 U. S., 15, it was held, under a statute similar to this in Nebraska, that a suit in equity could be
55 maintained against a party claiming an adverse interest in real property where neither party was in possession and where it was "unoccupied and uncultivated land," and it was explained that an action of ejectment would not lie in such a case, because the land had no occupant. In other words, it was vacant land. In the present case not only did the land have an occupant when the original bill was filed, but it was in the possession of the public administrator under the authority and jurisdiction of the superior court of the State. "An administrator appointed by a State court is an officer of that court; his possession of the decedent's property is a possession taken in obedience to the orders of that court; it is the possession of the court, and it is possession which cannot be disturbed by any court" (Byers *v.* McAuley, 149 U. S., 608). It follows that while the possession of the administrator continued no decree for the possession of the real property in his custody could have been entered in favor of the complainants, but it appears that on the next day after the filing of the original bill the defendant Florence secured possession of the property, and she has ever since continued in the possession of the same. She was therefore in possession when the second amended and supplemental bill was filed, and against her at that time, so far as appears from the bill of complaint, a suit in ejectment by the complainants, claiming to be heirs of Thomas H. Blythe, would have afforded a plain, adequate, and complete remedy. Section 1452 of the Code of Civil Procedure of California provides that heirs may themselves or jointly with the executor or administrator maintain an action for the posses-
56 sion of real estate. Such an action by the heir alone was sustained in Crosby *v.* Dowd, 61 Cal., 557, 600, and see also Janes *v.* Throckmorton, 57 Cal., 368. When the right set up by the plaintiff in a court of the United States is a title to real estate and the remedy sought is its possession and enjoyment the remedy should be sought at law, where both parties have a constitutional right to call for a jury (Whitehead *v.* Shattuck, 138 U. S., 146; Sanders *v.* Deveraux, 61 Fed., 311; Little Rock Junction R'y *v.* Burke, 66 Fed., 83).

As the view here taken of this feature of the case disposes of the motion to dismiss the bill, it will not be necessary to consider the question of parties and diverse citizenship.

The bill of complaint will be dismissed.

(Endorsed:) Opinion on motion of defendant Hinckley to dismiss suit. Filed December 6th, 1897. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

57 In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

JOHN W. BLYTHE and HENRY T. BLYTHE, Complainants,
vs.
FLORENCE BLYTHE HINCKLEY ET AL., Defendants. } No. 12144.

Third Amended and Supplemental Bill in Equity.

To the judges of the circuit court of the United States for the northern district of California:

John W. Blythe, of Fulton, and citizen of the State of Kentucky, and Henry T. Blythe, of Blytheville, and a citizen of the State of Arkansas, by leave of court first had and obtained, file this their third amended and supplemental bill in equity against Florence Blythe Hinckley, of San Francisco, and citizen of the State of California; and thereupon your orators complain and say:

That on the 3rd day of December, 1895, they filed their original bill of complaint herein, which was in substance as follows:

That your orators were citizens and residents of the States of Kentucky and Arkansas respectively; that defendant Florence Blythe Hinckley and others who are named therein as defendants, but who are not made defendants herein, each were
58 then citizens of the State of California; that complainants were then the owners as tenants in common with each other of the lands therein described, which are the same lands hereinafter described; that said lands were of the value of $3,000,000 and upwards; that said defendants claimed to own adversely to complainants some estate, title, or interest in said land, but that said claims of said defendants were and are groundless and without warrant of law, and their claims to said land were a cloud upon complainants' title thereto, and these complainants prayed that said defendants be required to set forth in this action by what rights and upon what grounds their said claims rested, and that it be finally adjudged herein that defendants, nor either of them, have any right or title to said land or any part thereof, and that complainants' title thereto be adjudged good and valid as against defendants and each of them, and for such other judgment and relief as might be just, and that said defendants, until the trial hereof, be restrained and enjoined from meddling or interfering with said lands or the rents and profits thereof, and for costs.

And your orators say that Thomas H. Blythe died intestate, in the city and county of San Francisco, State of California, on the 4th day of April, 1883, being at and before the time of his death a citizen of the United States and of the State of California and a resident of the city and county of San Francisco; that at and before the time of his death he was the owner in fee and seized and possessed of all the following-described real property, situated in the

city and county of San Francisco, State of California, and
59 bounded and described as follows, to wit:

Beginning at a point on the southerly line of Geary street, distant thirty feet and five inches westerly from the westerly line of Kearny street, thence southerly on a line at right angles to the said southerly line of Geary street fifty feet and three-fourths of one inch, more or less, to the northwesterly line of Market street; thence southwesterly along the said northwesterly line of Market street three hundred and eighty-four feet and ten and seven-eighths inches, more or less, to the northerly line of O'Farrell street; thence westerly along the said northerly line of O'Farrell street forty feet and one and one-half inches, more or less, to the easterly line of Dupont street; thence northerly along the said easterly line of Dupont street two hundred and five feet; thence at right angles easterly sixty feet; thence at right angles northerly twenty feet; thence at right angles westerly twenty feet; thence at right angles northerly fifty feet to the said southerly line of Geary street; thence easterly along the said southerly line of Geary street one hundred and thirty-five feet and six inches; thence at right angles southerly seventy-four feet and six inches; thence at right angles westerly thirty feet; thence at right angles southerly three feet; thence at right angles easterly fifty feet and six inches; thence at right angles northerly seventy-seven feet and six inches to the said southerly line of Geary street, and thence easterly along the said southerly line of Geary street one hundred and fifty-six feet and six inches, more or less, to the point of beginning, being a portion of
60 the block of land bounded by Kearny, Market, Dupont (Grant avenue), and Geary streets, all in the city and county of San Francisco, State of California.

That said real property was, at the time of the death of said Blythe, and has ever since been and now is of the value of $3,000,000 and upwards.

And your orators further say that they were and are the next of kin and heirs-at-law of the said Thomas H. Blythe, deceased, and as such your orators were and are entitled to take and have by succession and they did take by succession the estate of said Thomas H. Blythe, deceased, and as such they are the owners in fee of the real property above described and entitled to the possession thereof.

And your orators say that defendant Florence was born in England, the bastard child of an unmarried woman, and was not the heir of Thomas H. Blythe, deceased. At the time of her birth, her mother was a resident of England and a subject of Victoria, Queen of Great Britain and Ireland; that said Florence was born a subject of Victoria, Queen of Great Britain and Ireland, and she remained in England at all times until after the death of said Thomas H. Blythe; that said Thomas H. Blythe was never married.

That after the death of said Thomas H. Blythe, as hereinbefore alleged, the public administrator of the city and county of San Francisco took charge of the estate of said Blythe and entered upon the administration of the same.

That after the death of said Thomas H. Blythe the said Florence,

for the first time, left England and came to the United States
31 and came to San Francisco, she being then an infant who had never before been out of England, and who was then and here ineligible to become a citizen of the United States, and who was, when she arrived in California, a non-resident alien.

That there was not at any time during the life of said Thomas H. Blythe any law in force in England under or by the force of which the said Blythe could have legitimated the said Florence or made her his heir-at law, nor was there at any time during the life of said Blythe any law in force in England under or by the force of which he could have released or absolved the said Florence of and from her allegiance to her sovereign Queen Victoria, or changed her status from that of a subject of England to that of a citizen of the United States, nor was there any such law in force in California.

That after said Florence came to San Francisco, to wit, in the year 1883, one James Crisp Perry, who was then and there a subject of Queen Victoria, was appointed by the superior court of the city and county of San Francisco guardian of said Florence; and thereafter, as such guardian, he commenced a special proceeding in said superior court in the name of said Florence to have the court ascertain, adjudge, and determine the claim of said Florence to the heirship of said Thomas H. Blythe and the ownership of his estate, and in substance that she, said Florence, was the daughter and sole heir of said Thomas H. Blythe under and by virtue of sections 230 and 1387 of the Civil Code of California or under and by virtue of one or the other of said sections, and by virtue thereof to have the said court adjudge and decree that said Florence was the sole heir-
62 at-law of the said Thomas H. Blythe and entitled to inherit his estate. Said proceeding was on said Perry's petition alone.

That your orators appeared in said action or proceeding and filed their answer and cross-complaint therein, denying and contesting the right and title of said Florence and claiming for themselves to be heirs of said Blythe.

That thereafter such proceedings were had on said petition in said court in the said special proceeding that it was for the first time made to appear plainly to the court upon the record, as the fact was and is, that said Florence was an illegitimate child; that she was born in England; that neither she nor her alleged mother nor the mother nor father of the alleged mother had ever been within the United States or eligible to become citizens thereof until after the death of said Thomas H. Blythe, and your orators in that behalf allege that when it was so made plainly to appear to said court that the said Florence was a non-resident alien and had never been a *bona fide* resident of the State of California or of the United States until after the death of said Thomas H. Blythe and descent cast, and that she was not his heir, it was the duty of said court to dismiss the petition or complaint, or both, of said Florence in so far as the title and descent of the above-described real property was involved or affected, for want of jurisdiction.

Your orators further say that in the said proceeding wherein the

said Florence was petitioner and plaintiff it was at the trial
63 thereof attempted to be proven by her and in her behalf that the said Thomas H. Blythe, after the birth of the said Florence and before his death and while he was living in the State of California and while the said Florence was living in England as aforesaid, attempted to legitimate the said Florence by adoption under said section 230 of the Civil Code, or to institute her as his heir under said section 1387 of said Code, and your orators say that the parties went to trial.

And your orators further say that said court, without any jurisdiction so to do, decided in substance and effect that said Thomas H. Blythe had in his lifetime adopted and legitimated the said Florence by holding and deciding that sections 230 and 1387 of the Civil Code of California operated upon said Florence while an alien and residing in England, and gave power to said Blythe to adopt her and make her his heir while said Florence was in England and said Blythe was in California, which said statute did not do; and in that behalf your orators say that in making said decision the court did not take into consideration section 1978 of the Revised Statutes of the United States, nor were the rights of your orators or of said Florence, under that section or at all, adjudged or determined.

That from said judgment your orators appealed to the supreme court of the State, and in that court the cause was argued and the judgment appealed from, affirmed by a divided court, but
64 your orators allege without jurisdiction so to do, for the reasons herein stated, and without considering the questions herein presented.

And in that behalf your orators say that they are informed and believe, and they thereupon allege, that they are not precluded by said decision, which was limited to declaring that Florence was said Blythe's heir nor by anything contained in the record of the said proceedings upon which said last decision was made, from prosecuting this their action in this court, nor is this court precluded from entertaining jurisdiction of this action and deciding it on its merits, nor is said last decision binding or obligatory as authority or otherwise upon this court.

And your orators further say that heretofore, to wit, on June 18, 1894, said Florence, calling herself Florence Blythe, filed in said superior court in the matter of the estate of Thomas H. Blythe, deceased, her petition for distribution praying for an order of said court distributing to her the share of said estate to which she claimed to be entitled, to wit, the whole of said estate, embracing the real property first above described, to which she alleged herself to be entitled only by descent as sole heir-at-law and sole next of kin to said Thomas H. Blythe, deceased.

That in her said petition it was made plainly to appear to said court, as the fact then was and is, that said Florence, the petitioner, was a non-resident alien, in which capacity alone she claimed said real estate, and was not and never had been a citizen of the United

States or a resident of California and had never been in the
65 United States until after the death of said Thomas H. Blythe
and descent cast, at which time she was a non-resident alien;
and your orators say that it was then the duty of said court to dismiss the said petition for distribution of said Florence in so far as the title and descent of the above-described real estate was involved or affected for want of jurisdiction and because said Florence was not the heir of said Thomas H. Blythe; that your orators answered said petition for distribution, and thereby took issue upon all the material averments thereof, and therein claimed said estate as heirs of said Blythe.

That afterwards the court, without right or jurisdiction so to do, heard said petition for distribution, and afterwards, on October 26, 1894, said court granted a decree of distribution, and on that day a document which falsely purported to be a decree of distribution of nearly all the property of said Thomas H. Blythe to said Florence, embracing all the real property above described, was signed by the judge of said court and filed with the clerk, and on the next day thereafter was recorded in the minute book of said court.

And your orators say that said pretended decree of distribution was and is null and void for want of jurisdiction in said court to make the same for the following reasons, among others: Section 671 of the Civil Code of California, reading as follows: "Every person, whether citizen or alien, may take, hold and dispose of property, real or personal, within this State," was and is void as to aliens, and section 672 of said Civil Code which reads as follows: "If a non-resident alien take by succession, he must appear and claim the
property within five years from the time of succession, or be
66 barred," under which alone she claims title, is also void as
to aliens, and especially as to said Florence.

Your orators allege that said sections and each of them is an encroachment upon and an invasion and violation of and a substitution for the treaty-making power of the United States, and, if enforced, operate as treaty provisions between the State of California and all foreign governments, and were and each of them is void and in conflict with and forbidden by section 10, article I, of the Constitution of the United States and with the treaty-making power thereof, and in violation of and in conflict with section 1978 of the Revised Statutes of the United States, and both of them are and each of them is in excess of the jurisdiction of the State of California to enact, and of the courts of California to enforce; that said judgment or decree awarding said real property to said Florence on her petition alone, as was done, has no other legal support or justification than said sections of the Code of California, which are void, so far as they apply to aliens, and particularly to said Florence, for the reasons that they violate the Constitution and laws and treaties of the United States, and because California and her courts have no jurisdiction to enact or enforce said statutes or either of them as to aliens, and said statutes violate and each of them violates and is forbidden by the Constitution of the United States, the treaty-making power, and existing treaties of the United States, and

said judgment or decree in execution of said statutes is void.

Your orators allege that none of the constitutional or other
67 objections aforesaid to the jurisdiction of said court or the validity of said statutes, as applicable to said Florence, were decided or considered by the court upon the hearing of said petition for distribution; that the judgment of said superior court awarding said property to said Florence was further without jurisdiction, for said court held, adjudged, and decreed that said Blythe's alleged action under section 1387 of the Civil Code of California, reading as follows: "Every illegitimate child is an heir of the person who in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child," operates and did operate upon said Florence in England and outside of and beyond the geographical jurisdiction and boundaries of the State of California, and said court adjudged and held that said statute and said action operated to change and fix the social, political, and legal status of said Florence while an illegitimate alien, as she then and there was residing in England at the time of descent cast and always prior thereto.

Your orators say that said section 1387 does not in terms operate beyond the geographical boundaries of the State of California, and it had no operation or effect at any time in the Kingdom of Great Britain, nor did any alleged action under it; and it had no operation upon said Florence or her right to said real property at the time of descent cast or prior thereto, nor did said judgment so operate; that said section, as construed by the court, was and is against article I, section X, of the Federal Constitution and an invasion of the jurisdiction of international intercourse between the United States Gov-
68 ernment and the government of England, which jurisdiction is exclusively with the United States and was and is unconstitutional and void because thereof, and because of a lack of power and jurisdiction in California or its courts to give said statute the operation which it was adjudged by said court to have, and invades the treaty-making power of the United States, and said section is in violation of section 1978 of the Revised Statutes of the United States and of the rights of complainants. Your orators say that said judgment is a fraud upon the laws of the United States and upon complainants, and is therefore void; and your orators say that on the 21st day of September, 1892, said Florence was married to Frederick W. Hinckley and has taken the name of Florence Blythe Hinckley and she is sued herein under said name, and her husband is now dead, and complainants now make no claim against him, and in the original bill the Blythe Company was made a defendant, but subsequently a decree was made, upon the motion of the complainants, dismissing the cause as to the Blythe Company.

And your orators further say that heretofore and since the time of filing the original bill herein, to wit, on January 2nd, 1896, said Florence, calling herself Florence Blythe Hinckley, filed in said superior court, in the matter of the estate of Thomas H. Blythe, deceased, her petition for final distribution to her of said estate, wherein and whereby she prayed for an order of said court dis-

ributing to her the residue of said estate then remaining undis-
ributed, amounting to the sum of $89,842.94, the same and the
whole thereof being the rents accrued from the real property
9 aforesaid, to which she alleged herself to be entitled only by
descent as the sole heir-at-law and next of kin of said dece-
lent, Thomas H. Blythe; the consideration of which petition was
vithout the jurisdiction of said court as aforesaid.

That in her said petition it was made plainly to appear to said
court, as the facts then and there were, that said Florence, the peti-
ioner, was born and continued to be a British subject and a non-
resident alien until after the death of said Blythe and descent cast,
nd she was not and never had been a resident or inhabitant of the
State of California, and never had been within the United States
until after the death of said Thomas H. Blythe and descent cast;
and your orators say that it was the duty of said court then to dis-
miss said petition for final distribution to said Florence Blythe
Hinckley for want of jurisdiction in said court to adjudge her
capable of inheriting said real property. Said proceeding was on
the petition of said Florence alone.

That notice of said petition was given to your orators, who were
notified and invited to come into court and show why said petition
should not be granted.

That, in obedience and response to said notice, your orators did,
on January 16, 1896, file in said court their answer wherein and
whereby they denied the right of the said Florence to have said
rents distributed to her and claimed that they were the heirs and
next of kin of said Thomas H. Blythe, deceased, and entitled to
said rents.

That afterwards, on the 16th day of January, 1896, said
70 court, sitting in probate, without right or jurisdiction so to do,
heard said petition for final distribution, and wrongfully
struck from the files the answer and opposition so theretofore filed by
your orators, and when your orators arose and attempted to object
to and show cause why said petition should not be granted, said
court refused to permit your orators to be in anywise heard.

And afterwards, on January 18th, 1896, said court granted a de-
cree of final distribution, and on that day a document, which falsely
purported to be a decree of final distribution, distributing to said
Florence all the residue of said estate, based solely upon said peti-
tion last aforesaid, was signed by the judge and filed with the clerk
and entered in the minute book of the court.

And your orators say that said pretended decree of final distribu-
tion was and is null and void for want of jurisdiction in said court
to make the same, for the reasons as hereinbefore specified; and
your orators further say that at the date of filing the original bill
herein neither party hereto was in possession of the land hereinbe-
fore described, but the same was in the hands and possession of the
public administrator of the city and county of San Francisco, State
of California.

But since the filing of said bill, to wit, December 4, 1895, said
Florence has secured possession of said real property and the said

rents and the whole thereof through said pretended judgments and decrees aforesaid, and without any other or further right than as above set forth, and she is now in possession of the same.

71 And your orators say that sections 671, 672, and 1387 of the Civil Code of California, through which, and not otherwise, said Florence claims title to said real property and said rents, are and each of them is in conflict with existing treaties between the United States of America and Russia and Switzerland and France and England and against the Constitution of the United States in the particulars hereinbefore mentioned, as well as the fourteenth amendment thereto, which limits the jurisdiction of the State to its own citizens.

The complainants claim that they had the right, as citizens of the United States, to inherit the real property here involved under the laws of California and under article IV, section 2, of the Constitution of the United States and under section 1978 of the Revised Statutes of the United States, and that said Florence has and had no right thereto, because at the time of the death of Thomas H. Blythe and descent cast she was an illegitimate alien and a British subject and was and always had been in England, and that in determining the question of the rights of the parties herein the construction and application of the Constitution of the United States are involved, and therefore your orators allege and claim that this court has jurisdiction thereof, on the ground that the construction and application of the Federal Constitution are involved, as well as on the ground of diverse citizenship of the parties, and because said sections of said Civil Code violate the Federal Constitution, as herein stated.

72 That said real property is all of it built upon, being covered with stores and tenements, which are much used and in great demand as places of business and which are all occupied by tenants and bring in a monthly rental of about $12,000, which said Florence receives each month without any just or lawful right so to do, for the reason that the same belong to your orators.

That said Florence has no property; that she is and will continue to be insolvent and largely indebted, to wit, in the sum of $500,000 and upwards, and wholly unable to account for and restore said rents and income received, and which she will continue to receive, to said estate or to your orators.

And defendant Florence claims some right or title to said lands and property adverse to your orators, which claim is false and groundless and a cloud upon your orators' title.

Your orators further show to this honorable court that the suit herein set forth and pending is founded upon section 738 of the Code of Civil Procedure of the State of California, the purpose of which is to provide for determining an adverse claim, should one be set up by defendant, in a suit in equity; that if your orators be required to institute a suit in ejectment they will be deprived of their right under said statute to have said adverse claim set up by defendant, if she make such claim, and to have said claim first determined.

Your orators say that if defendant, under the laws and Constitu-

tion of the United States, as in this bill set forth, had no inheritable blood at the time of descent cast, as your orators allege, then she has no title to the property described herein and has no right to impose on your orators a vast and unnecessary pecuniary burden
73 and cost and the expense of establishing their title, though it be as they allege it to be in this bill.

Your orators allege that their proof of their title in ejectment is scattered and requires a large outlay of money, the procurement of testimony of witnesses residing at remote distances from this court; that many of the witnesses of the facts herein set forth in your orators' favor are dead and many of them are aged and infirm; that it will require great labor, time, and delay to establish the facts as they exist, and will require unnecessary labor of the court to examine said testimony if presented in ejectment, all of which will be without advantage or benefit to the defendant, and will neither impair nor strengthen her rights, if any, and is immaterial to her.

Your orators say that they do not controvert defendant's title to said real property if she can and did take the same by inheritance under the laws and facts set forth in this bill; that in order to ascertain the validity of defendant's adverse claim it is wholly unnecessary to go to the cost, expense, and delay of establishing complainants' title; that said last requirement does not rest upon your orators under said section of said statute; that the rule prevailing in ejectment that plaintiff must first show title in himself has no application to this suit.

That the purpose of said statute and of equity jurisdiction thereunder is to set up and establish, if it exists, an adverse claim in the defendant. This is its primary and exclusive object, and your orators aver that their rights under said section would be
74 violated and their equities denied by forcing them to present their case in a court of law.

Your orators aver and concede that if defendant, under the circumstances and under the law stated in this bill, be the child of Thomas H. Blythe and had inheritable blood and took by descent the real property herein described, all of which is easily proved, if true, by accessible testimony, your orators are one degree further removed in inheritable blood than defendant from said Thomas H. Blythe; but your orators aver and contend that defendant had no inheritable blood whatever. Your orators show that she is required under said statute to establish affirmatively that she inherited said property; that the establishment of her adverse claim, if valid, is a matter of law and settles the case finally for her. If the law does not make her eligible to take, her claim is void, and she has no equitable or other interest in embarrassing your orators in the attainment of their rights to said estate; that this honorable court sitting in equity, has power to reduce this controversy, and said statute reduces it, to the narrow scope of determining the adverse claim of defendant, should one be by her set up. A squatter's title is not recognized by said statute.

And your orators aver that it is inequitable, unjust, and oppressive to impose upon them the vast cost, expense, and delay and risk

of the death of witnesses hereinabove stated and of procuring their proof, in which defendant has no interest and which is immaterial to her and in nowise affects or benefits her.

75 Wherefore, in consideration of the premises, and inasmuch as your orators are remediless at law and can have no adequate relief save in a court of equity, where matters of this and the like nature are properly cognizable and relievable, and to the end that the respondent may appear and answer all and singular the matters and things hereinbefore in this their amended and supplemental bill complained of, but without oath to her several answers, your orators expressly waiving the oath of respondent to her answer hereto, your orators pray that defendant be required to set forth and specify with particularity any adverse claim which she may have to the real estate and property here in controversy and how and in what manner and from whom she derived the same.

That your orators order, adjudge, and decree that your orators were at the time of the death of said Thomas H. Blythe and now are the heirs-at-law of the said Thomas H. Blythe, and as such heirs did inherit and were and are entitled to inherit the said above-described real estate from said Thomas H. Blythe.

That the defendant to this bill has not now and never has had any right, title, or interest in or to the above-described real estate and property as heir-at-law of the said Thomas H. Blythe or otherwise.

That the title of your orators to said real estate be quieted in and by the decree of your honors, and that they be let into possession thereof.

That as to the said Florence Blythe Hinckley an account of the rents and profits which have been received or which may be

76 hereafter received up to the final hearing by the said Florence Blythe Hinckley or by any one claiming under her be taken, and that upon the coming in of the report of the value thereof, and the confirmation of said report, — be adjudged and decreed to your orators.

And your orators pray for such other and further and particular relief as to your honors may seem meet and proper; that your honors appoint a receiver herein to take possession of the said above real estate, and to hold the same pending this action, and to collect the rents and profits of said real estate, and to manage the same under such particular or general orders as your honors may give and direct.

And your orators pray for general relief and for their costs.

S. W. & E. B. HOLLADAY,
Solicitors for Complainants.

L. D. McKISICK AND
CHANDLER & HOLLADAY.

(Endorsed:) Service of a copy of the within bill is admitted this 22d day of December, 1897. Rob't Y. Hayne, of counsel for Florence Blythe Hinckley. 3d amended and supplemental bill. Filed December 22nd, 1897, at 12.11 o'clock p. m. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

77 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

JOHN W. BLYTHE ET AL., Complainants,
vs.
FLORENCE B. HINCKLEY ET AL., Defendants. } No. 12144.

Bill of Exceptions as to Contents of Third Amended Bill.

On the 21st day of December, 1897, the complainants offered, as a part of their third amended and supplemental bill herein, the following:

"The issue hereby tendered in this bill of complainants' right to inherit the real property of Thomas H. Blythe, deceased, was not decided or adjudged by the State court, nor was the legal effect of the alienage of said Florence decided, nor was the construction or application of the Constitution, statutes, or treaties of the United States thereto, as in this bill specified, or the validity of sections 671, 672, or 1387 of the Civil Code of California, as applied to aliens, presented, considered, or decided, as fully appears from the petition of Florence Blythe, under section 230 of said Code and 1664 of the Code of Civil Procedure of California, in the superior court of the city and county of San Francisco, State of California, filed October 1, 1885, number 2401, and entitled 'In the matter of the estate of Thomas H. Blythe, deceased.'"

78 And moved this court to be permitted to file said bill with said provisions therein. The said court refused to allow said third amended and supplemental bill to be filed with said provisions included therein, and required said complainants, as a condition to filing said bill, to eliminate said provisions therefrom; to which ruling complainants objected and excepted, and filed said bill without said provisions, though tendering the same at the time of filing said bill, but insisting upon their right to have said provisions retained in said bill; and complainants herewith pray to be permitted to file said provisions as a part of said bill.

S. W. & E. B. HOLLADAY,
Solicitors for Complainants.

The foregoing petition coming on to be heard before the court and having been considered, the court denied the same and refused to allow said provisions to be included as a part of said bill; to which ruling complainants excepted, and pray that said exception be filed and made a part of the record, which is so ordered.

WM. W. MORROW, *Judge.*

Dated Dec. 22, 1897.

(Endorsed:) Application, objection, & exception of complainants as to refusal of court to permit certain provisions to go into 3d amended & supp. bill. Filed December 22, 1897. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

79 In the Circuit Court of the United States for the Ninth Circuit and Northern District of California.

JOHN W. BLYTHE and HENRY T. BLYTHE, Complainants,
vs.
FLORENCE BLYTHE HINCKLEY, FREDERICK W. HINCKLEY (Her Husband), and The Blythe Company (a Corporation), Defendants. } No. 12144

Final Decree.

The various matters herein disposed of having been duly and regularly argued and submitted to the court for decision, and the court having examined the same and having, on the 6th day of December, 1897, rendered and filed its opinions in relation thereto:

Now, therefore, it is considered, ordered, adjudged, decreed, and determined as follows, viz:

First. That the decree *pro confesso* of July 3rd, 1897, in favor of the cross-complainant, The Blythe Company, be, and the same is hereby, declared to be invalid, and the same is hereby set aside, vacated, and annulled as against the defendant Florence Blythe Hinckley, and the rule taking the cross-bill of the Blythe Company *pro confesso* as against the said Florence Blythe Hinckley, entered in the rule book in the clerk's office under date of April 6th,
80 1897, be, and the same is hereby, set aside, vacated, and annulled, and the order of the court of July 1st, 1897, that the cross-bill of the Blythe Company be taken *pro confesso*, be, and the same is hereby, set aside, vacated, and annulled.

Second. That the decree *pro confesso* of July 3rd, 1897, in favor of the cross-complainant, The Blythe Company, be, and the same is hereby, declared to be invalid as against the complainants in the suit, and the same is set aside, vacated, and annulled, not only as against the defendant Florence Blythe Hinckley, as aforesaid, but also against the complainants, John W. Blythe and Henry T. Blythe, and against each of said complainants, and in every particular and in all respects, and the rule taking the said cross-bill of the Blythe Company *pro confesso* as against said complainants entered in the rule book in the clerk's office under date of May 4th, 1897, be, and the same is hereby, set aside, vacated, and annulled, and the order of the court of July 1st, 1897, that the cross-bill of the Blythe Company be taken *pro confesso* be, and the same is hereby, set aside, vacated, and annulled.

Third. That the original "complaint" of the complainants, John W. Blythe and Henry T. Blythe, filed December 3rd, 1895, and also the "amended complaint" of said complainants, filed December 12th, 1895, and also the "second amended and supplemental bill in equity" of said complainants, filed January 14th, 1897, and also the complainants' third amended and supplemental bill, filed by leave of court this 22nd day of December, 1897, after the rendition
81 of the decision of the court upon the matters determined herein, but before the signing of this decree, be, and the same

are each hereby, finally dismissed as against each and all of the parties named therein respectively as defendants, and in all respects and in every particular, for want of either Federal or equity jurisdiction and without prejudice to complainants' right to bring or maintain an action at law.

Amended January 20, 1898. Wm. W. M., judge.

Fourth. That the pleading of the Blythe Company, filed on December 28th, 1895, and styled "Answer of the Blythe Company to the amended complaint," praying (among other things) for relief against the defendant Florence Blythe Hinckley, and also the pleading of the Blythe Company, filed on February 1st, 1897, styled "Answer of the Blythe Company, a corporation, to the second amended and supplemental bill of complaint of John W. Blythe and Henry T. Blythe, complainants," praying (among other matters) for relief against the defendant Florence Blythe Hinckley, be, and the same are, finally dismissed so far as they or either of them constitute a cross-bill or cross-complaint against any party to the cause, and that the pleading of the Blythe Company, filed on the 16th day of February, 1897, styled "Cross-bill of complaint in equity of the Blythe Company," together with the amendments made thereto, be, and the same is hereby, finally dismissed as against each and all of the parties named therein as defendants and in all respects and in every particular.

Fifth. The said Florence Blythe Hinckley has paid into court for the Blythe Company the costs imposed upon her as a condition of setting aside said decree in favor of the Blythe Company, and
82 has complied in all respects with the orders of the court in relation to the terms of the setting aside of said decree.

Sixth. This decree is rendered and is directed to be entered and enrolled as and for a final decree.

Dated December 22nd, 1897.

WM. W. MORROW,
Circuit Judge.

(Endorsed:) Final decree in favor of Florence Blythe Hinckley. Filed and entered December 22, 1897. Southard Hoffman, clerk.

83 In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

JOHN W. BLYTHE and HENRY T. BLYTHE, Complainants,
vs.
FLORENCE BLYTHE HINCKLEY ET AL., Defendants.

No. 12144.
Petition for Appeal.

To the hon. the judges of the circuit court above named:

Your petitioners, the complainants above named, respectfully represent that there is manifest error committed to the injury of petitioners by that part of the final decree pronounced in this case on

the 22d day of December, 1897, as amended by the court on the 20th of January, 1898, being paragraph "third" of said decree, in which said part of said final decree this court dismissed complainants' third amended and supplemental bill, and denied jurisdiction of the suit, allegations, facts, and averments of complainants, and decided that it had no jurisdiction thereof on the motion of defendant Florence Blythe Hinckley to dismiss for want of jurisdiction, and your petitioners respectfully represent that this court has jurisdiction of said suit, and erred in holding and deciding, as it did do, that it had no jurisdiction of complainants' suit on any ground set up by complainants, and that no Federal question was involved therein.

Your petitioners further show that they are entitled to
84 an appeal therein, because the jurisdiction of the court was involved and the construction and application of the Constitution of the United States was involved in the matters, allegations, and averments of complainants, though this court erred in decising otherwise, and that they were not involved; and your petitioners state that they are entitled to an appeal on the further ground that this court erred in deciding on said motion, as it did, that sections 671, 672, and sections 230 and 1387 of the Civil Code of California in their construction and application to this suit did not contravene the Constitution of the United States, as stated in the assignment of errors herewith filed.

Wherefore petitioners, considering themselves aggrieved by the decision of this honorable court in all the particulars stated, pray for an appeal from said final decree to the Supreme Court of the United States, as authorized by section 5 of the judiciary act of Congress of the United States, approved March 3d, 1891, on all the grounds stated in the assignment of errors hereto attached and herewith filed.

Your petitioners herewith file their bond in the penal sum of $500.00, which bond is approved by the Hon. William W. Morrow, one of the judges of this court.

S. W. & E. B. HOLLADAY,
Solicitors for Complainants.

85 *Order.*

Upon consideration of the petition for appeal to the Supreme Court of the United States by John W. Blythe and Henry T. Blythe, complainants, it is ordered that said appeal be granted, and that the bond in the penal sum of $500.00 having been executed and approved by the court, this appeal is granted and allowed in open court.

WM. W. MORROW,
Circuit Judge.

(Endorsed:) Complainants' petition for appeal. Filed March 2, 1898. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

86 In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

JOHN W. BLYTHE and HENRY T. BLYTHE, Complainants,
vs.
FLORENCE BLYTHE HINCKLEY ET AL., Defendants. } No. 12144.

Assignment of Errors.

And now on the — day of —— come the said complainants, by their solicitors, and say that the decree in said cause is erroneous and against the just rights of said complainants for the following reasons:

1.

The circuit court erred in entertaining the motion of defendant Florence Blythe Hinckley to dismiss for want of jurisdiction.

2.

The court erred in sustaining said motion to dismiss for want of jurisdiction.

3.

The court erred in rendering final decree for defendant Florence and against complainants dismissing the suit for want of jurisdiction.

87 4.

The court erred in holding that it had no equity jurisdiction of this suit, in view of the fact that it has sustained the motion of defendant to quash the summons issued herein, because said suit was cognizable only in a court of equity, by its order dated February 10, 1896, set forth in the record and bill of exceptions herein.

5.

The court erred in holding that complainants' remedy was at law and not in equity.

6.

The court erred in holding that it had no jurisdiction of complainants' suit, because the real property described by complainants and in question herein was in the charge of the public administrator of the city and county of San Francisco at the time the suit was instituted.

7.

The court erred in holding that it lost jurisdiction of complainants' suit because it was alleged by complainants in their 2d and 3d amended and supplemental bill that Florence Blythe Hinckley, defendant, gained possession of said real property after the institution of this suit.

8.

The court erred in holding that the laws of California governed, extended to, or applied to the alleged descent of the real property described by complainants to Florence Blythe, said defendant, then and always theretofore an illegitimate child and a British subject, residing in England.

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9.

The court erred in holding that it had no jurisdiction of the controversy between complainants and defendant Florence upon the allegations of the third amended and supplemental bill, inasmuch as it appears by the bill that complainants therein claim that section- 671 and 672 of the Civil Code of the State of California are in contravention of the Constitution of the United States.

10.

The court erred in holding that the title to the real property described by complainants did not vest in complainants on the death of Thomas H. Blythe, under the laws of California and section 1978 of the Revised Statutes of the United States and under their allegations (admitted by the motion to dismiss) that they were and are the next of kin.

11.

The court erred in holding, under the allegations of complainants, that said Florence Blythe could be or was adopted by or made the heir of Thomas H. Blythe by any act of his while he was in California and she was in England, a British subject and an illegitimate child.

12.

The court erred in not holding, under the allegations of complainants in that behalf, admitted to be true by the motion to dismiss for want of jurisdiction, that the State courts of California had no jurisdiction to entertain the petition and complaint of Florence Blythe, described by complainants, to establish her title as heir of Thomas H. Blythe to the real property described.

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13.

The court erred in holding that the Constitution of the United States, its construction and application, were not involved in determining the claim of Florence Blythe Hinckley and the claim of complainants to take the real property described by complainants be descent.

14.

The court erred in holding that sections 230 and 1387 of the Civil Code of California, or either of them, empowered Thomas H. Blythe, while being and acting in California, to adopt or legitimate defendant Florence Blythe, or to make her his heir while she was residing in London, England, as an illegitimate child of Julia

Perry and a British subject, and erred in holding that said statutes or any action of said Blythe thereunder did so operate.

15.

The court erred in not holding that the proceedings of the State court of California set forth by complainants, recognizing said Florence as the heir of Thomas H. Blythe, deceased, were void for the reasons in said 3d amended bill stated, and for want of jurisdiction in said State court to entertain her petition or complaint under section 1664 of the Code of Civil Procedure or under any other law of California.

16.

Said court erred in holding that State laws controlled the decision of said defendant Florence Blythe's claim to take the real property described by descent, and erred in holding that no Federal question was involved in determining her claim.

90

17.

Said court erred in holding that the claim of said Florence Blythe to said real property involved in this court no Federal question, and erred in holding that the construction and application of the Constitution of the United States to said claim was not involved, and in holding that the circuit court of the United States got no jurisdiction on the ground that the construction and application of the Constitution of the United States was involved.

18.

The court erred in holding that sections 671 and 672 of the Civil Code of California set up by complainants, so far as they related to non-resident aliens, were not and each of them did not contravene the Constitution of the United States, and particularly section 10, article I, thereof.

19.

The court erred in holding that sections 230 and 1387 of the Civil Code of California referred to by complainants, or any act of Thomas H. Blythe under them, operated beyond the territorial limit of California for any purpose whatever, and that said Florence took any rights under said sections or said alleged acts of Thomas H. Blythe.

20.

The court erred in refusing to permit complainants to incorporate in their third amended and supplemental bill, as a part thereof, the following provisions, viz: "The issue hereby tendered in this bill of complainants' right to inherit the real property of Thomas H. Blythe, deceased, was not decided or adjudged by the State
91 court, nor was the legal effect of the alienage of said Florence decided, nor was the construction or application of the constitution, statutes, or treaties of the United States thereto, as in this bill specified, or the validity of sections 671, 672, or 1387 of the

Civil Code of California, as applied to aliens, presented, considered, or decided, as fully appears from the petition of Florence Blythe under section 230 of said Code and 1664 of the Code of Civil Procedure of California, in the superior court of the city and county of San Francisco, State of California, filed October 1, 1885, number 2401, and entitled "In the matter of the estate of Thomas H. Blythe, deceased."

21.

The court erred in holding that any Federal question was presented by Florence Blythe in the proceedings mentioned in the 3d amended and supplemental bill in the State court, and in holding that the proceedings in the State court were *res adjudicata* in this case.

22.

The court erred in holding that it had no jurisdiction of the controversy between the complainants and the defendant Florence upon the allegations of the 3d amended and supplemental bill, inasmuch as it appeared from the bill that the case involves the construction or application of the Constitution of the United States.

23.

The court erred in holding that it had no jurisdiction of complainants' suit and of the matters and allegations of complain-
92 ants' 3d amended and supplemental bill, it appearing on the face of the bill that one of the complainants was a citizen of Arkansas and one of them was a citizen of Kentucky, and that the defendants were citizens of California, and the subject-matter in controversy, to wit, the real estate, is situate in the northern district of California and within the jurisdiction of the court; all of which facts were admitted by the motion to be true.

Wherefore complainants pray that the errors herein assigned be adjudged to be well taken, and that the decree of the circuit court rendered herein dismissing the complainants' third amended and supplemental bill be reversed, and that judgment be rendered for appellants or plaintiffs in error.

S. W. & E. B. HOLLADAY,
Solicitors for Complainants.

(Endorsed:) Complainants' assignment of errors. Filed March 2 1898. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

93 *Order Allowing Appeal (Minute).*

At a stated term, to wit, the November term, A. D. 1897, of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, held at the court-room, in the city and county of San Francisco, on Wednesday the 2nd day of March, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: Honorable William W. Morrow, circuit judge.

JOHN W. BLYTHE ET AL.
vs.
FLORENCE BLYTHE HINCKLEY ET AL. } No. 12144.

Upon application of E. B. Holladay, Esq., one of the solicitors for complainants, and upon consideration of the petition for appeal to the Supreme Court of the United States by John W. Blythe and Henry T. Blythe, complainants, it is ordered that said appeal be granted and that the bond in the penal sum of $500.00 having been executed and approved by the court, this appeal is granted and allowed in open court.

94 In the Circuit Court of the United States, Ninth Circuit Northern District of California.

JOHN W. BLYTHE and HENRY T. BLYTHE, Complainants,
vs.
FLORENCE BLYTHE HINCKLEY ET AL., Defendants. } No. 12144.

Bond on Appeal.

Whereas John W. Blythe and Henry T. Blythe, complainants in the above-entitled suit, are about to appeal to the Supreme Court of the United States from the decree of the circuit court of the United States in and for the northern district of California, entered in said suit on December 22nd, 1897, in favor of defendant Florence Blythe Hinckley and against complainants, John W. Blythe and Henry T. Blythe, dismissing their said suit for want of jurisdiction:

Now, therefore, in consideration of the premises and of such appeal, the undersigned, the American Surety Company of New York, a corporation duly authorized and empowered so to do, does hereby undertake and promise on the part of the appellants, John W. Blythe and Henry T. Blythe, that the said appellants shall prosecute their said appeal to effect, and if they fail to make their plea good shall answer and pay to said Florence Blythe Hinckley all costs that may be awarded against them or the appeal or on a dis-
95 missal thereof not exceeding the sum of five hundred dollars ($500.00), to which amount it, the American Surety Company of New York, acknowledges itself bound.

In witness whereof the said American Surety Company of New York has hereunto affixed its corporate seal and caused its corporate name to be hereto signed and these presents to be executed by its proper officers thereunto duly authorized this 28th day of February A. D. 1898.

AMERICAN SURETY COMPANY
OF NEW YORK,
[SEAL.] By S. G. MURPHY,
Resident Vice-President.
CHARLES A. SHURTLEFF,
Resident Assistant Secretary.

Attest: JAMES R. GARNISS,
Resident Manager.

Registered for American Surety Co. of N. Y. by First nat'l bank, San Francisco, Cal., by J. K. Carter.

(Endorsed:) Undertaking on appeal (complainants). Approved this second day March, 1898. Wm. W. Morrow, judge. Filed March 2, 1898. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

96 *Order that Clerk Send Certain Papers to Supreme Court of the United States.*

At a stated term, to wit, the November term, A. D. 1897, of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, held at the court-room, in the city and county of San Francisco, on Wednesday, the 2nd day of March, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: Honorable William W. Morrow, circuit judge.

JOHN W. BLYTHE ET AL.
vs.
FLORENCE BLYTHE HINCKLEY ET AL. } No. 12144.

Upon motion of Robert Y. Hayne, Esq., counsel for the defendant Florence Blythe Hinckley, it is ordered that the clerk of this court send up to the Supreme Court of the United States as a part of the record copies of the following documents: The original complaint, the amended complaint, the second amended and supplemental bill, the third amended and supplemental bill, the final decree in the cause, a copy of this order, and that no certificate shall be sent by the clerk to the Supreme Court of the United States without a compliance with this order.

Counsel for said defendant, Florence Blythe Hinckley, also objected to the making of a second certificate upon jurisdictional questions in this cause.

97 In the Circuit Court of the United States for the Northern District of California.

JOHN W. BLYTHE and HENRY T. BLYTHE, Complainants,
vs.
FLORENCE BLYTHE HINCKLEY ET AL., Defendants. } No. 12144.

Certificate to Jurisdictional Questions.

Be it remembered that on the 14th day of January, 1897, the above-named complainants, by leave of the said court first had and obtained, filed their second amended and supplemental bill against the defendants in the above-entitled action.

And be it further remembered that on the 15th day of February, 1897, the defendant Florence Blythe Hinckley, by leave of the court

appeared specially in said action, by her solicitor, and moved the court to dismiss this suit upon the following grounds, to wit:

"That it appears from the second amended and supplemental bill of complaint filed in the above-entitled suit this court has no jurisdiction of the matters and things in the alleged cause of action in said second amended and supplemental bill of complaint stated."

That thereafter said motion came on to be regularly heard before the court, and was argued by the respective solicitors and
98 counsel for the complainants and said Florence Blythe Hinckley, and the court, having taken time to consider the same, did, after due consideration thereof, sustain the said motion and ordered this suit to be dismissed for want of jurisdiction, but gave the complainants leave to amend their bill upon the understanding that it would not necessitate any further argument, but should be subject to the prior motion to dismiss the second amended and supplemental bill and to the order for a final decree entered thereon; that thereafter, in due season, on the 22nd day of December, 1897, the complainants, pursuant to the leave given them by said circuit court, filed their third amended and supplemental bill against the said defendant, Florence Blythe Hinckley, and thereupon and in due season the said defendant, by her solicitor, appeared to said last bill and moved the court to dismiss the suit upon the same grounds and for the same reasons stated and contained in the motion hereinbefore set out to dismiss the second amended and supplemental bill.

It was thereupon stipulated and agreed in open court by and between the solicitors for complainants and said defendant, Florence Blythe Hinckley, with the consent of the court, that said last-named motion should be and the same then and there was submitted to the court for its decision upon the facts, matters, and things stated and alleged in said third amended and supplemental bill of complaint and upon the said motion of said defendant, Florence Blythe Hinckley, and upon the arguments of solicitors and counsel for the respective parties made by them on the hearing of the motion to dismiss the suit and cause of action in said second amended
99 and supplemental bill stated and alleged. The final decree was rendered, entered, and enrolled in said cause on the 22nd day of December, 1897, which final decree is hereby referred to and made a part hereof, and the clerk of this court is hereby directed to annex to this certificate and to certify up to the Supreme Court of the United States as part of this certificate a copy of said final decree.

Upon the consideration of the last-named motion to dismiss this suit upon the ground, to wit:

"That it appears from the third amended and supplemental bill of complaint filed in the above-entitled suit this court has no jurisdiction of the matters and things in the alleged cause of action in said third amended and supplemental bill of complaint stated"—the following questions of law arose upon the face of said third amended and supplemental bill and upon said motion, and the same were considered and decided by the said circuit court, viz:

I.

Whether or not upon the facts, matters, and things stated and alleged in said third amended and supplemental bill, and by said motion admitted to be true in so far as the same are well pleaded in said bill, it appeared to the satisfaction of the said circuit court that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this the said circuit court, and upon that question the said circuit court held and decided that it did appear to the satisfaction of the said court that the facts, matters, and things stated and alleged in said third amended and supplemental bill do not really and substantially involve
100 a dispute or controversy properly within the jurisdiction of said circuit court within the meaning of the provisions of section 5 of the act of March 3, 1875 (18 Stat., 472). The said circuit court therefore sustained said motion for want of jurisdiction to entertain this suit and ordered and decreed the suit to be dismissed for want of jurisdiction.

II.

Upon consideration of said motion by the said circuit court the following questions arose upon the face of said third amended and supplemental bill and upon said motion, namely: Whether or not upon the facts, matters, and things stated and alleged in said third amended and supplemental bill, and admitted by the said motion to be true in so far as the same are well pleaded in said bill, the said circuit court has or had jurisdiction to inquire into the jurisdiction of the superior court of the city and county of San Francisco, State of California, to adjudge, as it did, as appears by said bill, that the defendant Florence Blythe Hinckley, who was, as appears by the bill, a native-born subject of Victoria, Queen of Great Britain and Ireland, and who was the illegitimate child of an unmarried woman, and who was never in the United States until after the death of said Thomas H. Blythe and descent cast, and who was ineligible to become a citizen of the United States until after the death of the said Thomas H. Blythe, was, by the said Thomas H. Blythe, lawfully adopted as his daughter or lawfully instituted as his heir-at-law under the laws of the State of California, and to adjudge, as said superior court did, as appears by said bill, that the said Florence Blythe Hinckley
101 was and is the sole heir-at-law of the said Thomas H. Blythe and as such heir entitled to inherit from said Thomas H. Blythe the real estate in controversy in this suit and to have the same distributed to her, as was done by the judgment of said superior court, and whether the said circuit court had jurisdiction upon the facts stated and alleged in said third amended and supplemental bill to inquire into the jurisdiction of the supreme court of the State of California to affirm the said judgment of the said superior court awarding and distributing the real estate in controversy to the said Florence Blythe Hinckley as heir-at-law of said Thomas H. Blythe and delivering the possession of said real estate to her, as stated in said bill. Upon those questions the said circuit court held

and decided that it had no jurisdiction to inquire into the jurisdiction of either of said State courts over said subject-matters, and that as to those matters the said judgments of said State courts were and are conclusive against the jurisdiction of said circuit court, and thereupon the said circuit court dismissed this suit for want of jurisdiction.

III.

Upon the consideration of said motion by the said circuit court the question arose whether or not upon the facts, matters, and things stated and alleged in said third amended and supplemental bill and by the motion admitted to be true, in so far as the same are well pleaded in said bill, the said circuit court has or had jurisdiction to inquire into and decide upon the alleged right of the
102 defendant Florence Blythe Hinckley, at the death of said Thomas H. Blythe and descent cast, to inherit the real estate of said Thomas H. Blythe, to the exclusion of complainants, under and by virtue of the constitution or laws of the State of California, or under the judgments of the courts of California referred to in said bill, anything in the law of nations, the Constitution of the United States, section 10 of article I of said constitution, the 14th amendment thereto, and section 1978 of the Revised Statutes of the United States to the contrary notwithstanding. The said circuit court held and decided that it had no jurisdiction to inquire into or to hear and determine said questions, and ordered the bill dismissed for want of jurisdiction, and decreed accordingly.

IV.

Upon the consideration of said motion by the said circuit court the question arose whether or not, upon the facts, matters, and things stated and alleged in said third amended and supplemental bill, all of which are admitted by the motion to be true in so far as the same are well pleaded in said bill, the said circuit court has or had jurisdiction to entertain said third amended and supplemental bill, and upon said bill to grant any relief to the complainants in this suit. The said circuit court held and decided that it had no jurisdiction to grant any relief to complainants upon the case made in said bill, and thereupon ordered said third amended and supplemental bill to be dismissed for want of jurisdiction, and decreed accordingly.

V.

103 Upon the consideration of said motion by the said circuit court the question arose whether or not, upon the facts, matters, and things stated and alleged in said third amended and supplemental bill, the court has or had jurisdiction to entertain said bill and to hear and determine the dispute or controversy in this suit, founded as it is upon the provisions of section seven hundred and thirty-eight (738) of the Code of Civil Procedure of the State of California. The said court held and decided that it had no jurisdiction to entertain said bill and to hear and determine the matters

in controversy in this suit under and by virtue of the provisions of the said section of said Code of Civil Procedure of the State of California, and ordered the bill to be dismissed for want of jurisdiction, and decreed accordingly.

VI.

The question arose whether this court had jurisdiction to entertain said suit upon the matters and facts alleged in complainants' third amended and supplemental bill, to dispose of the controversy involved under its general powers and under sections 738 and 380 of the Code of Civil Procedure of California relative to actions brought for the purpose of determining adverse claims to real estate. The court decided it had no jurisdiction.

VII.

The question arose whether this court had jurisdiction to entertain said suit, inasmuch as it appears by the allegations of said bill that at the time of the institution of this suit by the filing of complainants' first complaint herein the public administrator of
104 the city and county of San Francisco was in possession of the real estate in controversy. The court decided it had no jurisdiction.

VIII.

The question arose whether this court had jurisdiction to entertain this suit, inasmuch as it appears by the allegations of said bill that subsequent to the institution of this suit and at the time of the filing of said third amended and supplemental bill said Florence Blythe Hinckley, defendant, had become and in fact was in possession of the real estate in controversy. The court decided it had no jurisdiction.

IX.

The question arose whether, upon the allegations of the bill and the construction and application of the Constitution of the United States with respect thereto, this court had jurisdiction to entertain said suit. The court decided it had no jurisdiction.

X.

The question arose, upon the allegations of said bill, whether the State of California has or had jurisdiction to provide for the descent of real estate to an illegitimate, non-resident alien subject of the Kingdom of Great Britain and Ireland, who was at all times until after descent cast outside the territorial limits of the United States, in the absence of a treaty between the United States and said kingdom, enabling such alien to take. The court decided that this court had no jurisdiction.

XI.

The question arose, upon the allegations of the said bill,
105 whether sections 671 and 672 of the Civil Code of California, set forth in said bill, as applied to the complainants' claim

and to defendant Florence's alleged adverse and invalid claim, contravene the Constitution of the United States and the statutes and treaties thereof and the treaty power of the United States, and are therefore inoperative and void.

XII.

The question arose, upon the allegations of the said bill, whether the courts of California had jurisdiction to maintain and enforce said sections 671, 672, 230, and 1387 of the Civil Code of California or either of them, set forth in said bill, by adjudging and decreeing said Florence, defendant, who was, as stated in said bill, an illegitimate child of Julia Perry and a non-resident alien, outside the territorial limits of the United States, at all times until after descent cast, to be the legitimate child and heir of said Thomas H. Blythe, a citizen of the United States, and entitled to take by succession, under the intestate laws of California, his real estate here in controversy.

XIII.

The question arose, upon the allegations of the said bill, whether in determining the claim of said Florence Blythe Hinckley, then and there, at the time of the death of said Thomas H. Blythe, a British subject, illegitimate, residing in England, to take the real property of said Thomas H. Blythe by descent, in the absence of a treaty enabling her so to do, the construction and application of the Constitution of the United States were involved.

106

XIV.

The question arose, upon the allegations of the said bill, whether the proceedings in the State courts of California awarding the real estate in controversy to Florence Blythe Hinckley were void for want of jurisdiction in said court to award the property to her, a British subject and a non-resident alien at the time of descent cast, in the absence of a treaty between the United States and England enabling her to take by descent.

XV.

The question arose, upon the allegations of the said bill, whether the proceedings of the State court finding said Florence to be the sole heir of said Thomas H. Blythe, deceased, and entitled to the distribution of his estate, were not void because said Florence was a British subject, illegitimate, residing in England at the time of descent cast, and there was no treaty between the United States and England providing that English subjects might inherit real estate in the United States.

All of the foregoing questions are, and each of them is, hereby certified to the Supreme Court of the United States, pursuant to section 5 of the judiciary act of March 3, 1891.

WM. W. MORROW,
Circuit Judge.

March 2, 1898.

(Endorsed:) Certificate of jurisdictional questions (complainants). Filed and entered March 2, 1898. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

107 UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, Northern District of California.

JOHN W. BLYTHE ET AL. *vs.* FLORENCE BLYTHE HINCKLEY. } Clerk's Office. No. 12144. Præcipe.

To the clerk of said court.

SIR: Please prepare certified transcript of the following pleadings, papers, and proceedings herein, viz: Original complaint, amended complaint, *subpœna ad respondendum*, second amended and supplemental bill in equity, notice of motion of Hinckley to dismiss suit, order dismissing action as to Blythe Co., order amending second amended and supplemental bill and dismissing cause as to Boswell M. Blythe, opinion on Hinckley's motion to dismiss, third amended and supplemental bill in equity, bill of exceptions as to contents of third amended bill, final decree, complainants' assignment of errors and prayer for reversal, complainants' bond on appeal, complainants' petition for allowance of appeal and order, order allowing appeal (minute), order that clerk send certain papers to Supreme Court of the United States, and certificate to jurisdictional questions, the same to constitute the record upon the appeal of complainants herein to the Supreme Court of the United States upon jurisdictional questions.

Dated August 5th, 1898.

S. W. & E. B. HOLLADAY,
Solicitors for Complainants.

(Endorsed:) Filed August 5, 1898. Southard Hoffman, clerk.

108 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

JOHN W. BLYTHE and HENRY T. BLYTHE, Complainants, *vs.* FLORENCE BLYTHE HINCKLEY, Respondent. } No. 12144.

Certificate to Transcript.

I, Southard Hoffman, clerk of the circuit court of the United States, ninth judicial circuit, northern district of California, do hereby certify the foregoing one hundred and seven pages, numbered from 1 to 107, inclusive, to be a full, true, and correct transcript of the following pleadings, papers, and proceedings in the above-entitled cause, viz: Original complaint, filed December 3, 1895;

amended complaint, filed December 12, 1895; *subpœna ad respondendum*, issued September 16, 1896, and filed October 2, 1896; second amended and supplemental bill in equity, filed January 14, 1897; notion of motion of Hinckley to dismiss suit, filed February 15, 1897; order dismissing action as to the Blythe Company, signed, filed, and entered February 26, 1897; order amending second amended and supplemental bill and dismissing cause as to Boswell M. Blythe, signed and filed June 1st, 1897; opinion on Hinckley's motion to dismiss, filed December 6, 1897; third amended and supplemental bill in equity, filed December 22, 1897; bill of exceptions as to contents of third amended bill, filed December 22, 1897; final decree, signed, filed, and entered December 22, 1897; complainants' petition for allowance of appeal and order, filed March 2, 1898; complainants' assignment of errors and prayer for reversal, filed March 2, 1898; order allowing appeal (minute), entered March 2, 1898; complainants' bond on appeal, filed March 2, 1898;
109 order that clerk send certain papers to Supreme Court of the United States, entered March 2, 1898, and certificate to jurisdictional questions, signed, filed, and entered March 2, 1898, and that the same together constitute the record ordered to be prepared by complainants' solicitors (as indicated in their præcipe, a copy of which is included in this transcript) upon the appeal of John W. and Henry T. Blythe, complainants, to the Supreme Court of the United States herein, upon jurisdictional questions.

I further certify that the cost of the foregoing transcript of record is $65.20, and that said amount was paid by the solicitors for the complainants.

Seal U. S. Circuit Court, Northern Dist. Cal.

In testimony whereof I have hereunto set my hand and *and* affixed the seal of said circuit court this 9th day of August, A. D. 1898.

SOUTHARD HOFFMAN,
Clerk of United States Circuit Court,
Northern District of California.

[Ten-cent U. S. internal-revenue stamp, canceled Aug. 9, 1898, S. H.]

110 UNITED STATES OF AMERICA, *ss:*

To Florence Blythe Hinckley, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 26th day of September, A. D. 1898, pursuant to an order allowing appeal made by and entered upon the minutes of the circuit court of the United States of the ninth judicial circuit in and for the northern district of California in that certain suit (numbered 12144) wherein John W. Blythe and Henry T. Blythe are complainants and appellants and you are respondent and appellee, to show cause, if any there be, why the final decree in the said order allowing appeal mentioned

should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable William W. Morrow, United States circuit judge, ninth judicial circuit, and judge of the circuit court of the United States for the northern district of California, this second day of August, A. D. 1898, and of the Independence of the United States the one hundred and twenty-third.

WM. W. MORROW,
Circuit Judge.

111 [Endorsed:] Original. In the Supreme Court of the United States. John W. Blythe and Henry T. Blythe, appellants, *vs.* Florence Blythe Hinckley, appellee. Citation. Filed August 5th, 1898. Southard Hoffman, clerk U. S. circuit court, northern district of California.

Service of within citation by copy admitted this 5th day of August, A. D. 1898.

WM. H H. HART,
Solicitor for Florence Blythe Hinckley.
AYLETT R. COTTON, *Of Counsel.*

Endorsed on cover: Case No. 16,952. N. California C. C. U. S. Term No., 367. John W. Blythe and Henry T. Blythe, appellants, *vs.* Florence Blythe Hinckley. Filed August 16th, 1898.

IN THE

Supreme Court of the United States

No. 367.

JOHN W. BLYTHE and
HENRY T. BLYTHE,
Appellants,

vs.

FLORENCE BLYTHE HINCKLEY,
Appellee.

APPELLANTS' REPLY BRIEF AGAINST THE MOTION TO DISMISS OR AFFIRM.

This suit involves the proposition maintained by appellents, that Section 10 of Article 1 of the Constitution of the United States, reading as follows:

> "No State shall enter into any treaty, alli-
> "ance or confederation,"

prohibits the respective States of this nation from making any laws concerning the descent of real property to non-resident aliens; and that

that subject is under the exclusive control of the Federal Government under its treaty-making power.

The above question presents itself thus:

There is a statute in California (known as Section 671 of the Civil Code), which reads thus:

> "Any person, whether citizen or alien, may "take, hold and dispose of property, real or "personal, within this State."

A man named Thomas H. Blythe whose heirs and next of kin these appellants are admitted to be, died intestate in California leaving a large estate in San Francisco land.

Appellee, Florence, was an English subject and an illegitimate infant child who had been and was in England till after descent cast.

She then came to California, and at her application, presented by an alien guardian, the Courts of California adjudged and distributed to her the land of said decedent, upon the sole claim that she was his illegitimate daughter and heir at law, and took by descent and not otherwise.

There is no treaty between England and the United States enabling her to take by descent.

Therefore Florence's sole possibility of taking by succession, was under said State statute.

These appellants, native citizens of the United States, residing in Kentucky and Arkansas, respectively, brought this suit against said Florence, who

(by marriage to a California man) had become meantime a resident and citizen of California, to quiet their title, setting up their claim that the said probate proceedings of the California Courts were void, because resting on void statutes, and were of no value against them, the next of kin and heirs at law of said Blythe.

This suit to quiet title was begun against said Florence before she was put into possession of said land, as authorized by a California statute (section 738 of the Code of Civil Procedure), which statute was sustained as a proceeding in equity by the decisions of this Court in

More *vs.* Steinbach, 127 U. S., 70, and
Ely *vs.* New Mex. &c., R. Co., 129 U. S., 293.

The Court got jurisdiction of this case in equity, under said statute, and on the ground of diverse citizenship of the parties, and on the ground that the land involved was in the northern district of California.

The bill alleges that California had no jurisdiction to enact or enforce Section 671 of the Civil Code, above set forth; and, also alleges, that Section 1978 of the Revised Statutes of the United States, confined inheritance of land to citizens of the United States.

The bill further alleges that none of the ques-

tions concerning the application or construction of the federal constitution or of this federal statute to this controversy, had been passed upon or considered in the said proceedings in the State Court.

Whatever proceedings *were* had in the State Court, were special, practically *ex parte*, and admintrative in their nature; under which, adverse pleadings were not permitted, and issues could not be and were not raised therein.

The questions are presented to this Court for the first time.

No non-resident alien has ever, by the judgment of this Court, been granted inheritance of land in the United States by virtue of a State statute to that effect, in the absence of an enabling federal treaty with the country of such alien.

Appellee's success on this motion would not only be a new and dangerous departure in federal jurisprudence, by conceding to the several states the treaty power to permit non-resident aliens to inherit land; but would result in giving to appellee San Francisco real estate valued at over $3,000,000; the property of appellants; and it would effect such results, without appellants being allowed a hearing either in the Circuit Court or in this Court.

And this, in the face of the facts, patent in the record, that appellants are citizens of Kentucky

and Arkansas, while appellee is a citizen of California, and the land involved is in California.

To appellants' case, as presented by their bill (Transcript, top page 29), appellee responded simply by a motion to dismiss for want of jurisdiction (Transcript, page 14), which was sustained by the Circuit Court.

Appellants made assignment of errors (Transcript, page 43), and the Court made its certificate of jurisdictional questions (Transcript, page 48).

The appeal from said judgment of dismissal is now met by appellee's present motion to dismiss or affirm.

Thus appellee seeks to establish her title to valuable land, and to dispose of this important and vital federal question (of the right of an illegitimate non-resident alien to inherit land in the United States in the absence of an enabling federal treaty), by securing as she has done, a denial of appellants' right to be heard in the Court below, and now by seeking, through the present motion, a denial of appellants' right to be heard in this Court.

The certificate of the Honorable Circuit Judge shows that these respective questions arose, and that the Court had no jurisdiction to decide them.

The facts in detail are as follows:

STATEMENT OF THE CASE.

This is an appeal from a decree of the Circuit Court of the United States, Ninth Circuit, Northern District of California, dismissing appellants' bill for want of jurisdiction.

Appellants made their case in their third amended and supplemental bill, found at page 57 (side paging) of the record.

Defendant Florence Blythe Hinckley, without demurrer or other pleading, moved to dismiss the said bill.

The ground named in the motion (page 28) was, that the Court had no jurisdiction of the cause of action stated in the complaint.

The Court, in its opinion (page 33 of record) held that under the Act of March 3, 1875, it had no jurisdiction and dismissed the bill.

The decree of dismissal (page 81) declares that it is dismissed "for want of either Federal or equity jurisdiction."

This appeal is taken, under the judiciary Act of 1891, upon a certificate of jurisdictional questions (page 97), signed by the Judge. And we appeal on other grounds under Section 5 of the Act.

Consequently, this case involves no other question than that of the jurisdiction of the Circuit Court over the case made in the bill.

The motion to dismiss compels the Court to assume the truth of all the facts as stated in the bill.

The subject matter of the suit is a block of land in the city of San Francisco, worth about three millions of dollars.

Appellants are citizens of Kentucky and Arkansas, respectively, while defendant Florence Blythe Hinckley is, and was at the time the bill was filed, a citizen of California.

Thus the land is within the jurisdiction of the Circuit Court, and the citizenship, being diverse, gives the Court jurisdiction of appellants' suit.

The land in question was owned by Thomas H. Blythe, an American citizen, who died in San Francisco in 1883, intestate.

Appellants are native-born citizens of the United States, are the next of kin and heirs at law of said Thomas H. Blythe, and took by succession the estate of said Blythe and became the owners of said land.

The bill alleges that said defendant Florence was born in England, the bastard child of an unmarried woman, and was not the heir of Thomas H. Blythe, deceased. At the time of her birth, her mother was a resident of England and a subject of Queen Victoria, andsaid Florence was born a subject of Queen Victoria; and she remained in England at all times until after the death of said Thomas H. Blythe; and said Thomas H. Blythe was never married (page 60).

There was not, at any time during the life of said Blythe, any law in England under which Blythe could have legitimated said Florence or made her his heir at law, nor was there any law in force in England under or by the force of which he could have released or absolved said Florence of and from her allegiance to her sovereign, Queen Victoria, or changed her status from that of an English subject to that of a citizen of the

United States, nor was there any such law in force in California.

After the death of said Thomas H. Blythe, the said Florence, for the first time, left England and came to the United States, and came to San Francisco, she being then an infant who had never before been out of England, and who was then and there ineligible to become a citizen of the United States, and who was, when she arrived in California, a non-resident alien (page 61).

After said Florence came to San Francisco, to wit: in 1883, one James Crisp Perry, himself a British alien, was appointed her guardian, and, as such, he commenced, in the name of said Florence, a special proceeding in the Superior Court to have the Court ascertain, adjudge and determine the heirship of said Thomas H. Blythe and the ownership of his estate, and, in substance, that she, said Florence, was the daughter and sole heir of said Blythe, and entitled to inherit his estate.

These appellants, being summoned, appeared in said action or proceeding, denying and contesting the right of said Florence, and claiming for themselves to be the heirs of Blythe. Said proceeding was on said Perry's petition alone.

Thereafter, such proceedings were had in said Court in said special proceeding that it was for the first time made to appear to the Court, upon the record, that said Florence was an illegitimate child; that she was born in England, and that neither she nor her parents had ever been within the United States, or eligible to become citizens thereof, until after the death of said Thomas H. Blythe.

And the bill alleges (page 62) that when it was so made plainly to appear to said Court that said Florence was a non-resident alien until after the death of said Thomas H. Blythe and descent cast, and that she was not his heir, it was the duty of said Court to dismiss the petition or complaint, or both, of said Florence, in so far as the title and descent of the above described real property was involved, for want of jurisdiction.

On the trial of said proceeding, Florence attempted to prove that the said Thomas H. Blythe, while he was in California, and while she was in England, attempted to legitimate her by adoption, under Section 230 of the Civil Code, or to institute her as his heir, under Section 1387 of the Civil Code.

And the bill alleges that said Court, without any jurisdiction so to do, decided that said Thomas H. Blythe had, in his lifetime, adopted and legitimated the said Florence, by holding and deciding that Sections 230 and 1387 of the Civil Code of California operated upon said Florence while an alien and residing in England, and gave power to said Blythe to adopt her and make her his heir while said Florence was in England and said Blythe was in California.

And the bill alleges that from said judgment these appellants appealed to the Supreme Court of the State, and in that Court the cause was argued and the judgment appealed from was affirmed, but without jurisdiction so to do, for the reasons herein stated, and without considering the questions herein presented.

And the bill alleges, that on June 18, 1894, said Florence filed in the Superior Court, in the matter of the

estate of Thomas H. Blythe, deceased, her petition, for distribution, praying for an ordr of said Court distributing to her the real property above described, to which she alleged herself to be entitled only by descent as sole heir-at-law and next of kin to said Thomas H. Blythe, deceased.

In her said petition, it was made plainly to appear to said Court that said Florence, petitioner, was a non-resident alien, in which capacity alone she claimed said property, and that she had never been in the United States until after descent cast, at which time she was a non-resident alien.

And the bill alleges that it was then the duty of the Court to dismiss her said petition for distribution, in so far as the title and descent of the above described real estate was involved, for want of jurisdiction.

And afterwards the Court, without right or jurisdiction so to do, heard said petition for distribution, and granted a decree of distribution, and a document which falsely purported to be a decree of distribution of nearly all the property of said Thomas H. Blythe to said Florence, embracing all the real property above dscribed, was signed by the Judge of said Court and filed with the Clerk, and on the next day thereafter was recorded in the minufe book of the Court.

And the bill alleges, that said decree of distribution was null and void for want of jurisdiction in said Court to make the same, for the following reasons, among others:

Section 671 of the Civil Code of California, reading as follows: "Every person, whether citizen or alien, may

"take, hold and, dispose of property, real or personal, "within this State," was null and void as to aliens, and Section 672 of said Civil Code, which reads as follows: "If a non-resident alien takes by succession, he must "appear and claim the property within five years from "the time of succession or be barred," under which alone she claims title, is also void as to aliens, and especially as to said Florence:

That said sections, and each of them, is an encroachment upon, and an invasion and violation of, and a substitution for, the treaty-making power of the United Staes, and, if enforced, operate as treaty provisions between the State of California and all foreign governments, and were, and each of them is, void and in conflict with, and forbidden by, Section 10, Article 1, of the Constitution of the United States, and with the treaty-making power thereof, and in violation of and in conflict with Section 1978 of the Revised Statutes of the United States, and both of them are, and each of them is, in excess of the jurisdiction of the State of California to enact, and of the Courts of California to enforce; that said judgment or decree awarding said real property to said Florence on her petition alone, as was done, has no other legal support or justification than said sections of the Code of California, which are void so far as they apply to aliens, and particularly to said Florence, for the reasons that they violate the Constitution and laws and treaties of the United States, and because California and her Courts have no jurisdiction to enact or enforce said statutes, or either of them, as to aliens, and said statutes violate, and each of them violates,

and is forbidden by, the Constitution of the United States, the treaty-making power and existing treaties of the United States, and said judgment or decree in execution of said statutes is void.

And the bill, continuing, alleges that none of the constitutional or other objections aforesaid to the jurisdiction of said Court or the validity of said statutes, as applicable to said Florence, were decided or considered by the Court upon the hearing of said petition for distribution; That the judgment of said Superior Court, awarding said property to said Florence was further without jurisdiction, for said Court held, adjudged, and decreed that said Blythe's alleged action under Section 1387 of the Civil Code of California, reading as follows: "Every illegitimate child is an heir of " the person who, in writing, signed in the presence of " a competent witness, acknowledges himself to be the " father of such child," operates, and did operate, upon said Florence in England, and outside of, and beyond, the geographical jurisdiction and boundaries of the State of California, and said Court adjudged and held that said statute and said action operated to change and fix the social, political and legal status of said Florence while an illegitimate alien, as she then and there was, residing in England at the time of descent cast and always prior thereto.

And the bill alleges (page 67), that said Section 1387 does not operate beyond the geographical boundaries of the State of California, and it had no operation or effect at any time in the Kingdom of Great Britain, nor did any alleged action under it; and it had no operation

upon said Florence or her right to said real property at the time of descent cast or prior thereto, nor did said judgment so operate; that said Section as construed by the Court was and is against Article I, Section X, of the Federal Constitution, and an invasion of the jurisdiction of international intercourse between the United States Government and the Government of England, which jurisdiction is exclusively with the United States, and was and is unconstitutional and void because thereof, and because of a lack of power and jurisdiction in California or its Courts to give said statute the operation which it was adjudged by said Court to have, and invades the treaty-making power of the United States, and said section is in violation of Section 1978 of the Revised Statutes of the United States, and the rights of complainants.

That said judgment is a fraud upon the laws of the United States, and upon complainants, and is therefore void.

And the bill further alleges, that, on the 21st day of September, 1892, said Florence was married to Frederick W. Hinckley, and has taken the name of Florence Blythe Hinckley, and she is sued herein under said name, and her husband is now dead, and complainants now make no claim against him.

And the bill alleges (page 60), that after the death of said Thomas H. Blythe, the Public Administrator of the City and County of San Francisco took charge of the estate of said Blythe, and entered upon the administration of the same. But (page 70-1), since the filing of the original bill, to wit: December 4, 1895, said Florence

has secured possession of said property and the said rents, and the whole thereof, through said pretended judgments and decrees aforesaid, and without any other or further right than as above set forth, and she is now in possession of the same.

And the bill alleges (page 71), that Sections 671, 672, and 1387 of the Civil Code of California, through which, and not otherwise, said Florence claims title to said real property, are and each of them is in conflict with existing treaties between the United States of America and Russia, and Switzerland, and France, and England, and against the Constitution of the United States in the particulars hereinbefore mentioned, as well as the Fourteenth Amendment thereto, which limits the jurisdiction of the United States to its own citizens.

The prayer of the bill is, that the Court adjudge and decree (page 75), that appellants were, and are, the heirs at law of the said Thomas H. Blythe, deceased, and as such heirs did inherit his real estate above described, and that defendant has not, and never had, any title thereto, as heir at law of said Blythe or otherwise; and that appellants' title be quieted by the decree of their Honors, the Judges of said Circuit Court; and that appellants be let into the possession thereof.

There is no treaty provision between the United States and Great Britain granting to British subjects the right to inherit land in the Unied States.

From the foregoing facts, it is apparent that the questions in the case are:

Whether the State of California has the power to extend to non-resident aliens the right to inherit real es-

tate in California, in the absence of a treaty provision to that effect between the United States and the country of such alien?

Whether such a State statute, permitting aliens to inherit, is not in direct violation of Section 10, Article I, of the Constitution of the United States, which reads as follows: "No State shall enter into any treaty, alli-" ance, or confederation"?

Whether such a statute is not an invasion of the treaty-making power of the United States, and therefore void?

Whether such a statute, enacted by a State, extends its virtue outside of the United States and into the heart of a foreign country, so as to give heritable blood to an illegitimate alien who has always been there residing up to the moment of descent cast?

Whether said alien, coming to the United States for the first time after descent cast, and coming into the State of its enactment, has, among the "*civil rights*" to which he may be entitled, the right to apply to the Courts of the State to enforce his claim, that he, while an alien, and in a foreign land, did inherit real estate by virtue of the statute of said State?

Whether such a demand (so based on the theory that a State has usurped the province of the treaty-making power) is one of the civil rights which an alien may apply to the State Courts to enforce?

Whether such a demand is not essentially a national political question?

Whether the State Court is not wholly without jurisdiction to pass upon or examine into such political question?

Whether the suit of said alien is not *coram non judice?*

Whether the statute under which the alien applies, being void, or the question of its validity being a political question, it is not the duty of the Court to refuse to proceed, and to dismiss the whole matter out of Court?

Whether, where the Court proceeds and treats the statute as valid and decrees the estate to the alien, such a decree is not wholly and absolutely void?

These questions all cluster about the main question—whether the United States Constitution does not prohibit the State from making any law giving to aliens the right to inherit land or to legitimate illegitimate persons, subjects and residents of other countries?

If, as we assert the fact to be, a State has no power to extend those rights to aliens, any statute of the State which, by words or construction, assumes to effect that end is void, and any suit brought by a non-resident alien in the State Courts to assert and enforce the operation of such a statute and obtain land, claimed by him by succession, is *coram non judice.*

For a number of years the declaration that a State has the right to regulate the rules of descent and succession in its own territories has been repeated many times.

We need not here combat that, as a general proposition. It is true enough as regards the citizens of the State itself, but it fails whenever it comes into repugnance with the Constitution of the United States or Section 1978 of the Revised Statutes of the United States.

As was said in the case of Baker *vs.* Portland, 5 Sawyer. 566, where the claim was advanced that the State of Oregon has the inherent right to provide by statute whom it would and would not employ to work upon the public streets—having passed a statute that no Chinese should be employed—while the general ruie was conceded, yet the statute was overthrown, the Court saying—

> " yet the State, being a member of the Union, and
> " subordinate to the Constitution, laws, and treat-
> " ies of the United States in the exercise of its pow-
> " ers, it may be restricted in the exercise of this
> " right in particular instances, by the operation of
> " such Constitution, laws, or treaties."

And it was adjudged that said statute of Oregon was void, because it prevented the Chinese from making a living here, a right which the treaty had guaranteed to them.

Therefore we say, that a State may have the right to regulate the succession of lands in its territory, yet it cannot extend to non-resident aliens the right to inherit, because the power to regulate that matter is, by the Federal Constitution, reserved to the general government.

THE SUBJECT OF INHERITANCE.

The right to take by inheritance is not a natural right, such as is the right to life, liberty, and property.

When it exists, it is a right provided by affirmative law.

There is no such thing as a natural law of inheritance.

2 Blackstone, 11.

It is incumbent on the party claiming, to establish his right affirmatively.

Therefore, in order to be enabled to inherit, the person must show some positive law enabling him to do so.

> "In case of a descent, the law takes no notice of
> "an alien heir, on whom, therefore, the inheritance
> "is not cast."
>
> Jackson ex dem. Gavensvoort *vs.* Lunn, 3 Johns. Cas., 109.

Aliens are not heirs; the law casts the descent on the next heir having heritable blood, passing by the alien as if not in existence.

> Orr *vs.* Hodgson, 4 Wheat., 453.

It is a well-recognized law that an alien cannot take a title to real estate by descent, as he can by purchase.

> Elmendorff *vs.* Carmichael, 14 Am. Dec., 87.
> Fairfax *vs.* Hunter, 7 Cranch., 619.

In the United States the right to take by inheritance finds its creation only in affirmative statutes.

The rights of succession enjoyed by American citizens are not of the same inherent inalienable character as their rights to life, liberty, and the pursuit of happiness.

When that right is ours, it is because some sufficient law conferred it on us.

If that is so with American citizens, it must be so—as to our lands—with aliens.

ALIEN'S INABILITY TO INHERIT LANDS.

1 Blackstone Com., *372.

"If an alien could acquire a permanent property
" in land, he must owe an allegiance, equally per-
" manent with that property, to the King of En-
" gland, which would probably be inconsistent
" with that which he owes to his own natural liege
" lord; besides that thereby the nation might in
" time be subject to foreign influence, and feel
" many other inconveniences. * * * Yet an
" alien may acquire a property, in goods, money
" and other personal estate, or may hire a house
" for his habitation; for personal estate is of a
" transitory and movable nature; and besides, this
" indulgence to strangers is necessary for the ad-
" vancement of trade."

No Act of Congress has ever conferred upon aliens the right to take lands by succession.

On the contrary, there is an Act of Congress which gives to citizens of the United States the right to inherit in every State, viz.:

Rev. Stats. U. S., Sec. 1978. "All citizens of the
" United States shall have the same right in every
" State and Territory as is enjoyed by white citi-

"zens thereof *to inherit*, purchase, lease, sell, hold,
"and convey real and personal property."

By implication, this statute affirmatively cuts off aliens.

"But an alien cannot take lands by descent, nor
"transmit them to others as his heirs by the com-
"mon law and in Massachusetts, upon the death
"of an alien intestate, his lands formerly vested at
"once in the Commonwealth."

1 Washburn on R. P., Sec. *49, p. 79.

"Though an alien can take by purchase or de-
"vise, which is taking by act of the parties, as con-
"tradistinguished from taking by operation of law,
"and can hold until office found, yet the law will
"not enable him to transmit by hereditary de-
"scent."

Mooers *vs.* White, 6 John. Ch., 360-5.

How, then, is the right to inherit land in the United States to be conferred upon aliens?

We contend that the treaty-making power of the general government alone has that right.

We insist that the States have no power whatever to deal with the subject.

THE SUBJECT OF INHERITANCE OF REAL PROPERTY BY ALIENS IS STRICTLY WITHIN THE TREATY-MAKING POWER OF THE UNITED STATES.

It was said in Geoffroy *vs.* Riggs, 133 U. S., 266 "That "the treaty power of the United States extends to all "proper subjects of negotiation between our Govern- "ment and the Governments of other nations is clear. "It is also clear that the protection which should be "afforded to the citizens of one country owning prop- "erty in another, and the manner in which that prop- "erty may be transferred, devised, or inherited, are fit- "ting subjects for such negotiation and of regulation "by mutual stipulations between the two countries," *et seq.*

In the Head Money cases, 112 U. S., 598, the Court said: "But a treaty may also contain provisions which "confer certain rights upon the citizens or subjects of "one of the nations residing in the territorial limits of "the other, which partake of the nature of municipal "law, and which are capable of enforcement as be- "tween private parties in the Courts of the country. "An illustration of this character is found in treaties, "which regulate the mutual rights of citizens and sub- "jects of the contracting nations in regard to rights "of property by descent or inheritance when the in- "dividuals concerned are aliens."

In the case of Wunderle *vs.* Wunderle, 144 Ill., at pages 53-4, the Court declares that the subject of regulating the rights of aliens to inherit real estate is di-

rectly within the treaty power of the General Government.

In this very State, as early as 1855, in the case People *vs.* Gerke, 5 Cal., 382, the Court directly adjudged that the power to extend to aliens the right to inherit lay clearly within the treaty-making power of the United States, and was therefore forbidden to the States.

The political history of this nation shows a large number of instances where the United States has, by treaty, conferred upon aliens, citizens or subjects of certain nations, limited rights of succession; limited because in each case the treaty contemplated and provided that the alien should "*dispose of the property and remove the proceeds*" within some reasonable time named.

Never has the United States granted to any aliens the treaty right to come and take lands by succession and reside on them forever.

Perhaps one exception should be made to the last allegation, viz.: the Ninth Article of the Jay Treaty, consummated in 1794, which provided that all citizens or subjects of either country who *then held* lands in the territory of the other, should continue to hold them, and might grant, sell or devise the same to whom they pleased in like manner as if they were natives, "and " that neither they nor their heirs or assigns shall, so " far as may respect the said lands and the legal reme- " dies incident thereto, be regarded as aliens."

That article of the treaty was construed in Blight's

Lessee *vs.* Rochester, 7 Wheaton, 535, where it was held that *it expired with the lives of those then in being.*

Crane *vs.* Reeder, 21 Mich., 66.

It is not now in operation.

THAT WAS THE ONLY TREATY PROVISION EVER ENTERED INTO BETWEEN GREAT BRITAIN AND THE UNITED STATES UPON THIS SUBJECT.

But, as we have before said, the LIMITED right to take by inheritance, coupled with the necessity to dispose of the same and remove the proceeds, has been often extended to subjects of certain countries, by treaty; *but never to Great Britain.*

According to the terms of our treaty with AUSTRIA, concluded in 1848, it is, in Article I, provided, that an Austrian subject may succeed to *personal* property in this country, and Article II provided, that,—

> " Where, on the death of any person holding real
> " property, or property not personal, within the
> " territories of one party, such real property would,
> " by the laws of the land, descend on a citizen or
> " subject of the other, were he not disqualified by
> " the laws of the country where such real property
> " is situated, such citizen or subject shall be *allowed*
> " *a term of two years to sell* the same, which term
> " may be reasonably prolonged, according to cir-
> " cumstances, and to withdraw the proceeds there-
> " of, without molestation, and exempt from any

"other charges than those which may be imposed
"in like cases upon the inhabitants of the country
"from which such proceeds may be withdrawn."

Article II of our treaty with the GRAND DUCHY OF HESSE, concluded in 1868, provides:

"Where, on the death of any person holding real
"property within the territories of one party, such
"real property would, by the laws of the land, de-
"scend on a subject or citizen of the other, were
"he not disqualified by alienage, such citizen or
"subject shall be allowed *a term of two years to sell*
"*the same*, which term may be reasonably pro-
"longed , according to circumstances, and to with-
"draw the proceeds thereof, without molestation,
"and exempt from all duties of detraction on the
"part of the Government of the respective States."

By Article II of our treaty with SAXONY, a subject of Saxony is permitted to take real property by inheritance in the United States, and is allowed *two years* from the descent cast in which to *sell it* and withdraw the proceeds.

By Article II of our treaty with WURTTEMBERG a subject of that country is permitted to take land by inheritance in the United States, and is allowed the *term of two years* to sell it and withdraw the proceeds.

Article XII of our treaty with ECUADOR provides:

"And if in the case of real estate said heirs
"would be prevented from entering into the pos-
"session of the inheritance on account of their
"character of aliens, there shall be granted to

"them *the term of three years* to dispose of the same "as they may think proper, and to withdraw the "proceeds without molestation, nor any other "charges than those which are imposed by the "laws of the country."

By Article VII of our treaty with the HANSEATIC REPUBLICS, it is provided, "* * * and if, in the "case of real estate, the said heirs would be prevented "from entering into the possession of inheritance on "account of their character of aliens, there shall be "granted to them *the term of three years* to dispose of "the same," etc.

In Article V of our tretay with the DOMINICAN REPUBLIC, it is provided:

> "When on the decease of any person holding "real estate within the territory of one party, such "real estate would by the law of the land descend "on a citizen of the other, were he not disqualified "by alienage, *the longest term which the laws* of the "country in which it is situated *will permit* shall be "accorded to him to dispose of the same"; * * *

By Article XII of our treaty with BOLIVIA, it is provided, "* * * And if in the case of real estate, "the said heirs would be prevented from entering into "the possession of the inheritance on account of their "character of aliens, there shall be granted to them the "*longest period allowed by the law* to dispose of the same "as they may think proper, and to withdraw the pro- "ceeds, without molestation, nor any other charges "than those which are imposed by the laws of the "country."

According to our treaties with certain other nations, their subjects (being permitted to inherit real property here), are allowed *a 'reasonable time'* within which to sell the same and remove the proceeds; as, for example, The Hawaiian Islands, Portugal, Mecklenburg-Schwerin, Prussia, Russia, and Spain.

In our treaty with SERBIA, in 1881, the United States agreed, in Article, II that—

> "In all that concerns the right of acquiring or "possesing or disposing of every kind of property, "real or personal, citizens of the United States in "Serbia and Serbian subjects *in the United States*, "shall enjoy the rights which the respective laws "grant or shall grant in each of these States to the "subjects of the most favored nation."

In our treaty with NEW GRENADA, concluded in 1846, by Article XII, it is provided:

> "The citizens of each of the contracting parties "shall have power to dispose of their personal "goods or real estate within the jurisdiction of the "other, by sale, donation, testament or otherwise; "and their representatives being citizens of the "other party shall succeed to their said personal "goods or real estate, whether by testament or *ab* "*intestato*, and they may take possession thereof "either by themselves or others acting for them, "and *dispose of the same by will*, paying such duties "only as the inhabitants of the country wherein "said goods are, shall be subject to pay in like "cases."

Article II of our treaty with BARVARIA, concluded in 1845, provdes:

"Where, on the death of any person holding real
"property within the territories of one party, such
"real property would, by the laws of the land, de-
"scend on a citizen or subject of the other, were he
"not disqualified by alienage, such citizen or sub-
"ject shall be *allowed a term of two years* to sell the
"same, which term may be reasonably prolonged,
"according to the circumstances, and to withdraw
"the proceeds thereof, without molestation, and
"exempt from all duties of *detraction*."

It is thus apparent that the treaty making power of the United States does extend to conferring upon aliens the right to inherit real estate in this country;

And it is plain that the treaty making power has done so very many times.

The validity of such treaty provisions and their prevailing effect over any State statute contrary thereto, have been decided a very many times.

Some the States have statutes forbidding inheritance by aliens, and cases have come before the Courts in those States, involving the claim of certain aliens—coming from countries with which the United States has made treaty provisions allowing limited inheritance—that they have succeeded to the lands in question.

In every one of those cases the treaty has prevailed over the statute, which has been pronounced void.

It was held in Adams *vs.* Akerlund, 168 Ill., 632, that:

The disqualification to inherit real property imposed by the Illinois Act of 1887 upon non-resident aliens is removed wherever there is a treaty between the United

States and the country of such aliens conferring the right to take or hold or transfer real estate.

In Opel *vs.* Shoup, 100 Iowa, 407, it was held that the treaty between the United States and Bavaria permitting subjects of the latter nation to take by inheritance, and allowing them two years to sell the property and withdraw the proceeds, rendered void a statute of Iowa prohibiting inheritance by aliens.

But the proposition which we assert goes beyond the mere *superiority* of treaty provisions over State statutes in this regard.

We assert that the *treaty power is exclusive.* THE STATES HAVE NO POWER TO TAKE ANY ACTION WHATEVER REGARDING THE RIGHTS OF ALIENS TO INHERIT LAND.

In the structure of our Government and the distribution of the several functions between the Central Government and the States, "the powers which one pos-
" sesses the other does not."

U. S *vs.* Cruikshank, 92 U. S., 550.

But the conclusive reason is, that the Federal Constitution itself, in express words, prohibits the States from invading the treaty making power.

By the expression "treaty making power," we mean all that is meant in the three words used in Article I, Section 10, of the Constitution, viz.: *treaty, alliance or confederation.*

Those three words cover the entire area of foreign relations, and no State can take any part in anything which has to do with the foreign relations of the United States.

In a learned opinion delivered in the case of Holmes *vs.* Jennison, 14 Peters, Chief Justice Taney expressed the very proposition we are here asserting, which opinion was expressly approved by this Court in U. S. *vs.* Rauscher, 119 U. S., 414.

That was a case where a man, Holmes, charged with crime in Canada, had escaped into Vermont, and the Governor of Vermont, acting on State authority alone, was about to surrender Holmes to the Canadian officers. Holmes claimed that under Article I, Section 10, of the Constitution the States cannot exercise the power of extradition.

Chief Justice Taney upheld that contention on the ground that, under that section of the Constitution, the States are excluded from the entire field of foreign relations.

He says (Holmes *vs.* Jennison, 14 Peters, 569):

"The power to make treaties is given by the Con-
" stitution in general terms, without any descrip-
" tion of the objects intended to be embraced by it;
" and, consequently, it was designed to include all
" those subjects, which, in the ordinary intercourse
" of nations, had usually been made subjects of ne-
" gotiation and treaty; * * *

" All the powers which relate to our foreign in-
" tercourse are confided to the General Govern-
" ment. * * *

Page 574: " The framers of the Constitution
" manifestly believed that any intercourse between
" a State and a foreign nation was dangerous to
" the Union; that it would open a door of which
" foreign powers would avail themselves to obtain

"influence in separate States. Provisions were "therefore introduced to cut off all negotiations "and intercourse between the State authorities "and foreign nations. If they could make no "agreement, either in writing or by parol, formal "or informal, there would be no occaasion for ne- "gotiation or intercourse between the State au- "thorities and a foreign Government.

"Hence, prohibitions were introduced, which "were supposed to be sufficient to cut off all com- "munication between them.

"But if there was no prohibtion to the States, "yet the exercise of such a power on their part is "inconsistent with the power upon the same sub- "ject conferred upon the United States. * * *

"The exercise of the power in question by the "States is totally contradictory and repugnant to "the power granted to the United States. * * *

"What avails it that the general government, in "the exercise of that portion of its power over our "foreign relations, which embraces this subject, "deems it wisest and safest for the Union to enter "into no arrangements upon the subject, and to "refuse all such demands; if the State in which "the fugitive is found may immediately reverse "this decision, and deliver over the defendant to "the Government that demands him? If the "power remains in the States, the grant to the "general government is nugatory and vain; and "it would be in the power of any State to over- "turn and defeat the decisions of the general gov- "ernment, upon a subject admitted to be within "its appropriate sphere of action, and to have "been clearly and necessarily included in the "treaty making power."

On page 576, the Court declares that the power of the United States in this respect, "from its nature, can "never be dormant."

A very little consideration will show the mischief which might eventually result result from the exercise of these powers by the several States regarding inheritance of land by aliens.

Each State would make laws to suit itself; they would not need to harmonize with the laws of other States, nor with the laws or policy of the federal government.

Different States could make widely different laws.

One State might grow partial to one nation or nations to the prejudice of others, and could readily make discriminating provisions upon the subject of inheritance by aliens.

One State might enact liberal provisions in favor of one nation and exclusion as to the rest, or it might exclude specific nations. Religious intolerance could readily find expression in the excluding from rights of inheritance subjects of Catholic countries; or several States could, by combined action, wield great power in these matters, so that the uniformity of federal power would be disconcerted and broken up, a result leading to the dismemberment of the Union.

Again, if every State, or any State, is permitted to legislate on this subject, its action *quo ad* property within its own borders, would operate to add to and thus modify as many treaties which the United States has entered into as are not exactly similar to its own enactment.

For instance, take this case, of a statute which permits all aliens to take freely without terms or conditions. If it be sustained, what is its effect? As to every treaty made by the United States granting to certain nations the right to take land by inheritance and dispose of the same and remove the proceeds, this statute grants further rights in California.

Whereas, by a given treaty, the alien must dispose of it and remove the same in one, two, or three years, California kindly strikes out the time limit and invites the alien to come and stay and hold the land.

As to nations to which no such privilege has been granted by treaty—has been refused, perhaps, for reasons of state policy—California blandly supplies the omission.

As to those nations who have secured for their subjects this privilege in a limited form by treaty, and who gave for it some valuable reciprocal concession, they would find that this valuable concession granted to them so sparingly by treaty is meanwhile being (in California) lavished upon all the world gratuitously.

Therefore, we say, such a state statute, if valid, would operate as an amendment to every treaty now existing between the United States and any foreign nation.

Counsel for appellee have already conceded in this case that, if the United States had entered into some treaty provision with Great Britain upon this subject, that would control; but they contend that the California law is proper until the Federal Government acts.

But the Federal Government *has already acted* in a

great many treaties, all applicable to California, where a qualified right to inherit has been given to many nations.

It has not been given to Great Britain.

So, if counsel's argument is good, the validity of the California statute has a checkered appearance. It is valid as to all those nations where there is no treaty provision, but as to all others it is void.

Our Courts are bound to presume that this Government has *refused* to make such a treaty provision with Great Britain.

This doctrine that a dormant Federal power may be exercised by the States is a false and exploded thing.

In Holmes *vs.* Jennison, 14 Peters, at page 576, Chief Justice Taney, after a long discussion of this subject, says that the power of the United States in this respect, "*from its nature can never be dormant.*"

The case, People *vs.* Curtis, 50 N. Y., 326, was an attempt on the part of New York's State Government, under an express statute of New York, to exercise the function of extradition of a criminal in favor of Belgium, and the effort was supported by the argument that the United States, in its treaty with Belgium, had left the feature of extradition unprovided for, and therefore the States could exercise that power. But the Court emphatically denied that proposition in the following words:

People *vs.* Curtis, 50 N. Y., 326:

"It is admitted by the Attorney-General that
"the general government possesses the power over

" the subject of extradition of fugitives from jus-
" tice, and that if it had exercised the power in re-
" gard to Belgium it would be exclusive, and that
" no one could be delivered except through the Fed-
" eral machinery; but he insists that this power is
" dormant as to all countries with which the Gov-
" ernment have made no treaty; that the States are
" not prohibited from exercising it, and that such
" exercise is not repugnant or inconsistent with the
" power conferred on the Government.

" This position is not tenable. It is true that
" a grant of power to the general government does
" not necessarily operate as a prohibition of the
" same power by the States. (Sturges *vs.* Crow-
" inshield, 4 Wheat., 122.) * * * This subject
" is not one of that character. The whole subject
" of foreign intercourse is committed to the Federal
" Government. Indeed, this was one of the prin-
" cipal purposes of the Union. As to foreign coun-
" tries, the States, as such, are unknown. The
" treaty making power is exclusive in the general
" government not only, but the States are prohib-
" ited from exercising it in express terms. So the
" appointment of embassadors and receiving em-
" bassadors from foreign countries are confided to
" the Union, and the States are prohibited from
" making any compact or agreement with any for-
" eign power. The Act of the Legislature under
" consideration authorizes foreign ministers and
" officers of foreign Governments to make a de-
" mand upon the Governor, and empowers him to
" treat with these ministers, and accede, in his dis-
" cretion, to their demand. It is patent that the
" exercise of such a power by the States may frus-
"trate the foreign policy of the Government, both
" as to countries with whom the Government has

"made a definite treaty, and as to those with
"which it has not.

"It has been the policy of the Government in
"later years to enter into extradition treaties with
"foreign nations; but the propriety of doing so in
"any particular case may depend upon a variety
"of circumstances known only to the officers of the
"Government.

"We cannot determine nor judicially know but
"that the Government, for reasons of public pol-
"icy connected with its negotiations, may have de-
"clined to enter into such a treaty with Belgium,
"the demanding country, or that country may
"have itself refused to make any such a treaty
"without some undue stipulation on our part. Is
"it to be tolerated that a State may overrule the
"decision of the Government, and thus embarrass
"its foreign negotiations, and, for that purpose,
"may the States receive and treat with foreign
"ministers?

"If one State may, all the States may make
"these arrangements, which arrangements may
"all differ from each other; and the same States
"may make different arrangements with each for-
"eign nation. The embarrassment which such an
"exercise of power by the States would produce to
"the general government in its foreign policy is
"obvious.

"The general government might adopt the pol-
"icy of refusing to make an extradition treaty with
"all nations, or it might refuse as to Belgium, or
"any other particular country.

"It cannot be said, from the absence of a treaty
"with any country or all countries, that the power
"is dormant. It may be as much exercised by re-
"fusing as by making a treaty.

"In the absence of a treaty we are to presume a "refusal or failure to make one on the part of the "Government. In either case, the power is not "dormant. The nature of the power is such that "it cannot be dormant. It is necessarily in active "exercise by the Government when acting or omit- "ting to act. The dormant powers are such as the "State may exercise over their own internal af- "fairs without colliding with the action or non- "action of the general government. Such is the "subject of Bankruptcy. * * *

"As to foreign intercourse, and all questions "relating thereto, the Government alone can speak "and act, and the power is therefore necessarily "exclusive."

Counsel are pleased to deride our assertion that this statute (671, Civil Code) is an invasion of the treaty making power.

They say, "California has made no treaty," and therefore there is nothing in our claim.

This same answer was made in the case of Holmes *vs.* Jennison, 14 Peters, 571, where, although admitting that the Governor of Vermont was about to turn over a fugitive to the Canadian authorities, yet they protested that Vermont had made no treaty with Canada.

But Judge Taney answered, that the contemplated action of the State was in the nature of an AGREEMENT, and, as such, came within the inhibition.

"Neither is it necessary, in order to bring the "case within this prohibition, that the agreement "should be for the mutual delivery of all fugitives "from justice, or for a particular class of fugitives.

"It is sufficient if there is an agreement to deliver
"Holmes. For the prohibition in the Constitution
"applies not only to a continuing agreement, em-
"bracing classes of cases, or a succession of cases,
"but to any agreement whatever.

"An agreement to deliver Holmes is, therefore,
"forbidden, and as much so as if it were an agree-
"ment to deliver all persons in the same predica-
"ment. Is there not, then, in this case, an agree-ment
"on the part of Vermont to deliver Holmes? And
"is he not detained in custody, to be delivered up,
"pursuant to this agreement?"

Applying that doctrine to this case:

An alien British subject filed in the California Court the claim, that California, by exercising the Federal prerogative belonging to the department of foreign relations, had invested her, while in England, with heritable blood and had changed her status, and thus enabled her to take this land by succession.

The State of California, through its judicial arm, has surrendered this land into her possession under said claim.

The claim was by a British subject. The form of pretended legal procedure, based on this void statute, was an agreement made by California with the other nation and the subject thereof, to surrender this land. It was an agreement; and California has agreed to surrender lands under similar circumstances every time.

The fact that the alien's application to the State for the land was made through the Courts, instead of through the Executive, does not help appellee; for, under the void statute, the Court had no jurisdiction to

act upon said Florence's petition, and its judgments and decrees were void.

MOTION TO DISMISS.

The motion to dismiss was made under the law of 1875, which law provided against impositions upon the Court by improperly arranging the parties to suits, or by exaggerating the amount involved so as to give apparent jurisdiction. The law of 1875, providing for such motion to dismiss, did not constitute such motion a plea, answer, or demurrer in equity, under or upon which an issue of fact or law could be tried. Such motion did not put in issue a cause of action, or become a substitute for a demurrer. For, if demurrer be sustained to a bill in equity, complainant may amend, while, under the operation of a motion to dismiss, no amendment is allowed or can be claimed as of right. The motion presents the single question of jurisdiction.

If a Court has no jurisdiction to entertain a case, no issue can be raised, tendered or tried in the case. No plea, answer, or demurrer can call up or beget an issue in such a case. A motion to dismiss a case for want of jurisdiction raises no issue in the case on the merits, but denies the possibility of issues existing or being raised in the case, and removes it practically from the docket of the Court, without action of the Court, except for costs or appeal.

Opposing counsel wish now to treat the action of the Court below on the motion to dismiss for want of juris-

diction, as a trial by the Court below of the case itself. This cannot be. Certificate, paragraph 10, page 104 (side paging), of record, shows that the bill raised the issue whether the State of California had jurisdiction to grant land in fee simple to aliens by descent, in the absence of a treaty enabling the alien so to take. The Court below says that such an issue was raised and tendered by the bill, but that the said Court had no jurisdiction to even consider such issue. An appeal is taken from such decision. The single question on the motion to dismiss filed in this Court is, did the Court below have jurisdiction to decide the issue at all? Not whether it decided right, but had the lower Court jurisdiction? It is therefore respectfully suggested that the parties were citizens of different States, and that the requisite amount is involved, and that the land in controversy is situate within the Northern District of California. The foregoing facts are all that is necessary to give jurisdiction. Jurisdiction is determined from the allegations of the bill.

City Ry. Co. *vs.* Citizens' Ry. Co., 166 U. S., 562.

THERE IS NO PLEA OF RES ADJUDICATA, OR OFFER OF THE STATE COURT RECORD IN EVIDENCE.

Counsel for appellee have not plead the proceedings in the State Court to sustain a plea of *res adjudicata;* no such plea is made; the only knowledge this

Court has of State Court proceedings, is what appellants state them to be, in the bills filed herein. Counsel for the appellee declined to plead to the bills filed herein, or to answer or to demur to them, but resorted to a motion to dismiss for want of jurisdiction, under the law of 1875.

The State Court of Califoria did not decide the constitutional question set up and plead in the bills filed herein, nor any of them. The bill states, on page 34 of the record (side page 67), that, "Your orators allege " that none of the constitutional or other objections " aforesaid to the jurisdiction of said Court or the va- " lidity of said statutes as applicable to said Florence, " were decided or considered by the Court upon the " hearing of said petition for distribution."

The truth of this allegation is admitted. It will be seen, also, on page 39 of the record, that appellants tendered, as a part of their third amended and supplemental bill, a complete statement that none of the questions raised in said bill had ever been passed upon by the State Court. This statement was made as a part of the bill offered, but the Court compelled appellants to eliminate said statement on objection thereto by appellee's counsel. Appellee seeks refuge on this topic in the case of Blythe *vs.* Ayres, 167 U. S., 746.

Appellants respectfully ask this Honorable Court to decide the scope and judicial use of a motion to dismiss under the law of 1875. It is respectfully submitted that such motion does not take the place in equity of appropriate pleadings. That a judgment of a Court of Equity dismissing a bill on such a motion, for want of

jurisdiction, is not the equivalent of a judgment by a Court of Equity dismissing a bill on a final hearing. Counsel for appellee in this case assume that in sustaining a motion to dismiss for want of jurisdiction in this case, the Honorable Court below decided the merits of the case, and all the equities therein involved, and that, therefore, appellants cannot appeal to this Court on the question of jurisdiction, but must go to the Court of Appeals on the merits, as though the whole case were tried on bill, answer, plea, or demurrer. Whereas, the law of 1875 contemplates a motion to dismiss when the Court is imposed upon by fictitious appearances of jurisdiction. When such motion is sustained, the merits of the controversy have not been reached or touched, because no merits within the jurisdiction of the Court were presented for decision. The only jurisdiction of the Court in such a case, the motion being sustained, is to adjudge the costs.

THE VALIDITY OF THE JUDGMENT OF THE STATE COURT DESCRIBED IN THE BILL WAS NOT DETERMINED BY SUSTAINING THE MOTION TO DISMISS FOR WANT OF JURISDICTION.

Counsel for appellee, on page 47 of their brief, say:

> " We shall argue that the decisions of the State
> " Courts referred to in the bills are conclusive
> " against appellants' claim, and that the bills show
> " no valid ground for attacking or disregarding

"them; that the State laws permitting aliens to
"inherit, and in relation to the institution of heir-
"ship, are not in conflict with any treaty, or an
"invasion of the treaty making power, or in viola-
"tion of any federal provision, but are valid laws.
"That, even if it were otherwise, the decisions of
"the State Courts of Probate cannot be attacked
"in the present suit."

On page 48 of the brief, they say:

"We shall further argue that no constitutional
"question is involved in the case."

We respectfully submit that this Court cannot be asked in this appeal to decide anything in the case, except whether the Honorable Circuit Court did or did not have jurisdiction to take up the matters which counsel say they will now argue here. They cannot appeal to the original jurisdiction of this Court on the several topics suggested in their brief. The learned Circuit Court below, in its certificate (found on pages 52-53 of the record), says, that the questions which opposing counsel say they will argue here arose on the face of the bill, but that the Court had *no jurisdiction to decide them*, or either of them, and therefore did not decide them. Appellate jurisdiction is limited to correcting or affirming decisions of lower Courts actually made. The only question decided by the Honorable Court below was, that it had no jurisdiction to proceed at all. The bill, as finally amended, presented a controversy between citizens of different States. There is no suggestion that these parties are improperly or collusively made up in the third amended and supplemental bill, filed with

leave of Court without objection. The land in dispute lies within the Northern District of California; the said Court therefore had jurisdiction of the parties to the suit and of the subject matter thereof, but declined to hear the complaint presented for hearing, without plea, answer, or demurrer filed thereto.

THE JUDGMENTS OF THE STATE COURTS OF CALIFORNIA WERE NOT HELD BY THE HONORABLE CIRCUIT COURT TO BE RES ADJUDICATA OF THE CONTROVERSY PRESENTED BY THE BILL.

Opposing counsel argue that the judgments of the State Court, mentioned in the bill, and as stated in the bill, were final of this contention. The learned Court below said, in paragraph 14 of its certificate, page 53, that the question of the effect of said judgments arose upon the allegations of the bill, but that the learned Court had no jurisdiction to decide it, and therefore did not decide it. The case cannot, therefore, be argued here as though the Court had, in fact, decided the effect of said judgments. The only question here presented on appeal is one of *jurisdiction* of the learned Court below. The legal effect of the judgments of a Court of record, when presented in evidence in a case being tried in another Court of record, can always be determined by the Court in which such judgments are offered in evidence. If the Court errs in determining the legal significance of such judgments when offered

in evidence, an appeal will lie to a proper Court on such error; but the Honorable Court in this case refused to decide the legal significance or effect of the judgments of the State Court, for want of jurisdiction so to decide. Opposing counsel present a brief to this Honorable Court, on the assumption that this Court is dealing originally with the cause of action presented in the bill, whereas the learned Court below declined to exercise its power to try the case or to consider the cause of action stated in the bill, for want of jurisdiction to consider it.

As an illustration, the Court says, in paragraph 9 of the certificate (side page 104), that the question arose upon the allegations of the bill, "and the construction " and application of the Constitution of the United " States with respect thereto, whether this Court had " jurisdiction to entertain said suit."

The Court decided it had *no jurisdiction.*

This decision is not the equivalent of holding that the Constitution of the United States, or its application or construction, was or was not involved; but it is a decision pure and simple that the learned Court below had no jurisdiction to decide, and, therefore, would not decide and did not decide, whether or not the Constitution of the United States, its application or construction, was, in fact, involved.

IT DOES NOT MATTER FOR THE PURPOSE OF JURISDICTION IN THIS CASE WHETHER A FEDERAL QUESTION WAS OR WAS NOT INVOLVED.

Opposing counsel seem to argue that, in order to give the Circuit Court jurisdiction, the controversy presented must be between citizens of different States, and involve the requisite amount, and also that there must be added thereto a Federal question; and, furthermore, that such Federal question must be presented with such conclusiveness that it is judicially impossible for the Court to decide against complainant's view of the Federal question. The argument seems to assume that if such a case is not presented, the Circuit Court has no jurisdiction, and the case may be summarily dismissed on motion, for want of jurisdiction; that the Court is not required to deliberate upon the claim made by complainant if it lack such conclusiveness, but may dismiss it peremptorily. Counsel's position rests upon the theory that if the judgment of the State Court, void on its face, is offered in evidence in a Federal Court, that such judgment must be respected equally with a valid judgment of a State Court, unless it can be shown that such void judgment has been reversed on a writ of error from the Supreme Court of the United States; and that, if the bill shows that a judgment of a State Court has been rendered at all, relating to the subject matter of the bill, though not on the issues presented by the bill, and though void on its face, yet the bill setting up such a state of facts may be dismissed for want of jurisdiction;

that the Court has no jurisdiction to touch the case, except to dismiss it.

IF, HOWEVER, THE MERITS AND ISSUES PRESENTED IN THE BILL ARE TO BE HERE TREATED AND EXAMINED AS THOUGH TRIED BELOW, IT IS PROPER TO CONSIDER THEM IN THEIR ORDER.

The first question presented is the alleged right of Florence Blythe to sue in the Superior Court of California for the real estate described in the bill. The question is, can the Legislature of California bring the power of the Government into action on this subject? Can California vest the right to permanent title in land, and permanent residence in the country, in a non-resident alien owing no allegiance to the country? Florence Blythe was still in England when her alleged right of succession vested. She came to the United States for the first time after descent cast, and began her litigation after she arrived here.

The subject matter of the proceeding in the State Superior Court was the claim of Florence to the real estate described in the bill. By jurisdiction of the subject matter, is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the Court, and is to be sought for in the general nature of its powers, or in authority specially conferred.

Cooper *vs.* Reynolds, 10 Wall., 316.

The question lying at the base of this contention is, does the sovereignty of California embrace power to bestow the land within her borders upon non-resident aliens, despite the general government. For what the State has power to do, the general government cannot prevent being done. If not, the Courts of California cannot do it. The judicial power of the State does not reach beyond the sovereignty of the State. The whole government of the United States is divided into two hemispheres, State and Federal. The powers residing in the Federal hemisphere are denied to the States.

If a State attempt to use a power lying within Federal sovereignty, such attempted use is nugatory, no matter with what apparent solemnity its attempted uses be clothed. The forms of State decrees, Court seals and attendant judicial ceremonies are legally lifeless unless the decree renderd has its root in the sovereignty of the State.

It seems extraordinary that, at this late day, opposing counsel deride the proposition that the Federal Government possesses exclusive sovereignty over all diplomatic concerns, or that a State Court cannot make a binding decree of title to real property to a non-resident foreign subject, based upon the State's grant of the right of succession to such alien. The so-called decree of distribution was rendered on Section 671 of the Civil Code of California, which reads as follows:

> " Any person, whether citizen or alien, may take,
> " hold, and dispose of property, real or personal,
> " within this State."

Take this statute away, and the thread of Florence's alleged title is cut.

The personal rights of an alien to protection in this country are not identical or coincident with his right to take and hold land in fee simple equally with a citizen.

While Courts of the country are, by the law of nations (not the law of a State), and by the Constitution of the United States and the Fourteenth Amendment thereof, thrown open to all persons to seek personal protection therein, neither international law nor the Federal Constitution gives to aliens the right to hold land by descent in the country and live thereon forever. Protecting an alien personally while in the country is one thing; giving him a grant of land in fee simple by act of law, is quite another thing.

Story's Equity Pleading, Sec. 54, says: "But, al- "though an alien friend is not incapacitated to sue in "Courts of Equity, yet this doctrine is to be under- "stood in a limited sense, that he is thereby under no "personal disability to sue. Still, the subject matter "of the suit must be such as will entitle him, as an "alien friend, to maintain it; for if it respects land or "any demand of a mixed nature, partly real and partly "personal, he may not be so entitled."

Coke upon Littleton, p. 129, B. Vol. 1, says: "And "true it is that an alien enemy shall maintain neither "real nor personal action, that is, until both nations be "at peace, but an alien that is in league shall maintain "personal actions, for an alien may trade and traffic, "buy and sell, and, therefore, of necessity, he must be

"of ability to have personal actions, but he cannot "maintain either real or mixed actions."

Counsel for appellee confound the right of an alien to personal protection while sharing the international hospitality of the country, with the right of alien to own the country in fee simple, and to reside therein forever. If a gentleman invite a guest to his house, and protect him while there, it does not follow that the guest is thereby made eligible to have a deed to the property.

A Court has no jurisdiction to permit its processes to be used by an alien, except to vindicate the civil or personal rights which that alien has.

Having no right to inherit land, the Court cannot extend to him its process to recover, as inherited, that which he cannot inherit.

The alien must have the legal right to that which lies behind the process, and gets no right in the process itself.

Any petition filed by him to recover land under claim of succession, is void on its face if it show that he is an alien; and any judgment recovered thereon by such an alien is void on its face.

STATE PROCEEDINGS.

The proceeding in the State Court was on the petition of Florence alone (side page 62 of record).

This was a special proceeding, resting upon Florence's petition alone, filed by an alien guardian.

Said Florence was compelled to recover, if at all, on the strength of her own title. This title did not depend upon the action or presence of any other claimant.

This title depended on the validity of Section 671 of the Civil Code, applicable to non-resident aliens.

This was her *enabling Act*, if there was any.

If this section breaks down, her claim under it breaks down also.

The defendants—these appellants—filed no petition of their own, but contested that of Florence.

No other pleading was before the State Court but hers. This gave no jurisdiction to the Court to adjudge anything in her favor, but her petition should have been dismissed.

SECTION 1664, C. C. P., DOES NOT APPLY TO NON-RESIDENT ALIENS.

It is true that Section 1664 of the Code of Civil Procedure, set out in appellee's brief, is general in its terms, and does not limit the right to appear and claim real estate thereunder to citizens of the United States; but the Constitution and laws of the United States, and all the limitations therein contained upon the power of the State of California, are just as much a part of said Section as though written therein; and when read under such limitations said section permits only citizens of the United States to file a petition thereunder; and, positively, by virtue of such limitations, excludes an alien from the right so to do.

A State statute, though general in its terms, includes only the persons over whom the State has jurisdiction. A petition filed under said section by an alien is not agreeable to said section, but in conflict with it.

Statutes derive their force from the authority of the Legislature which enacts them, and hence, as a necessary consequence, their authority as statutes will be limited to the territory or country to which the enacting power is limited.

It is only within these boundaries that the Legislature is lawmaker, that its laws govern people, that they operate of their own vigor upon any subject. No other laws have effect there as statutes. Statutes of other States, or national jurisdictions, are foreign laws, of which the Courts do not take judicial notice. They may be proved and taken into consideration in proper cases, subject to the provisions of domestic statutes and of the Constitution; but they are so considered only by principles of the common and international law, originating in the comity which exists between nations, and by force of the Federal Constitution betwen the States of the Union.

Bank of Agusta *vs.* Earl, 13 Peters, p. 519.
Sutherland on Statutory Construction, p. 12.

NO DECISION HAS EVER BEEN MADE UPON THE FEDERAL QUESTION HERE INVOLVED.

The brief for appellee, at page 66-7, says:

"The very question which the appellants seek to
"agitate has long ago been settled by the repeated

"decisions of this Court, as we now proceed to "show."

Before taking up the cases which are cited on this point, we ask the Court to remember that in the early history of this country the doctrine of States' rights was much more obstinately fixed in the judicial mind than at present; and that later decisions have more clearly and satisfactorily distinguished between the respective powers of the States and the Federal Government.

Now, we propose to show in a few words that each authority cited by counsel fell short of involving the present Federal question.

The case of Chirac *vs.* Chirac, 2 Wheaton, 269, did not involve the question whether a State has the power under the Constitution to regulate the right of aliens to inherit land.

In that case, a man died in Maryland, leaving heirs in France; and there was a statute of Maryland, passed in 1769, while Maryland was still a colony, which assumed to give rights to French subjects to hold land if they *qualified themselves as citizens of Maryland.* Later, however, the United States made a treaty with France, which Chief Justice Marshall said vested in the French heirs the title by descent. In stating the case, the opinion speaks of the statute of Maryland, and, referring to the French heirs, he says, "did his land pass "to these heirs, or did it become escheatable. This de- "pends on the law of Maryland." But that phrase was not the decision of the case. None of the parties in that case attacked the right of Maryland to make any

statute on the subject. The observation of the Court upon the effect of the statute only leads up to the decisive part of the opinion, as to the whole matter being superceded by the treaty.

In the case Spratt *vs.* Spratt, 1 Peters, 344, it is said:

> "The question of law which arose was the true "construction of a statute of the State of Mary-"land," reading—
>
> "That any foreigner may, by *deed* or *will* to be "hereafter made, take and hold lands," etc.

To take by deed or will is to take by purchase, not by inheritance.

The question before this Court is the right of the States to give non-resident aliens the right to take by *inheritance.*

Therefore, whatever was said in that case is not decisive of this question.

In the case of Levy *vs.* McCartee, 6 Peters, 103, Justice Story says, at page 109, that the question to be decided is, "whether one citizen can inherit, in the col-"lateral line, to another, when he must make his pedi-"gree of title through a deceased alien ancestor."

And the decision, being on this point alone, was that he could not.

The words used by the Court—"the question is one of "purely local law, and as such must be decided by this "Court"—have no controlling force in the opinion, because nobody denied that proposition; and the idea that a State has no right, under the Constitution, to meddle with the rights of inheritance of land by non-

resident aliens, seems not to have occurred to anybody connected with that case.

In Beard *vs.* Rowan, 9 Peters, 313, Justice Thompson says:

> "Both parties claim under the will of John "Campbell as the source of title. The demand- "ants claim under a deed from Richard Taylor, "the surviving executor of John Campbell bear- "ing date the 21st of April, 1826, etc. * * * "the tenant claims under a devise in the will of "John Campbell, and the decision in the case de- "pends mainly upon the *construction to be given to* "*this devise.*"

Is it not absurd for counsel to parade that decision concerning *purchase*, as being conclusive upon this Federal question of *inheritance?*

The decision in Mager *vs.* Grima, 8 How., 490, shows a statute of Louisiana, that every person not being domiciliated in that State, and not being a citizen of any State or Territory in the Union, who shall be entitled, whether as heir, legatee, or donee, to the whole or any part of the succession of a person deceased, shall pay a tax, etc.

The plaintiff in error was the *residuary legatee* of a decedent under a will.

So that that case did not necessarily involve more than the right of a State to tax aliens who took by *purchase.*

But while the counsel in that case spread over broader ground, yet the only constitutional objection to the tax was, because as a tax on money to be sent out of the country, it would be an interference with the

power of Congress to regulate commerce. A proposition which was not sustained. But no one in that case contended that the State tax on aliens, as to inheritance of land, violated the treay making power of the general government.

In Prevost *vs.* Greneaux, 19 How., 7, objection was made to this same tax. A man died in Louisiana in 1848, and the tax became due. A treaty was made between the United States and France in 1853, and in 1854 a brother came from France, obtained the property, and objected to the tax, claiming that the treaty had relieved him. The tax was upheld because it became due before the treaty, which yet contained nothing inconsistent with the tax.

But, in that case, the Court say:

> "The constitutionality of the law is not disputed."

How, then, can that decision be an authority on our present Federal question?

The decision in Frederickson *vs.* Louisiana, 23 How., 447, however, throws all of these Louisiana tax cases out of our further consideration here, by showing that the statute in question—

> "does not make any discrimination between the citizens of the State and aliens in the same circumstances. A citizen of Louisiana domiciliated abroad is subject to this tax."

In Airhart *vs.* Massieu, 98 U. S., 491, the Court, recognizing the old just rule that the division of an empire does not divest private titles, concedes the powers of

the Republic of Texas to make its own Acts of Congress.

Hauenstein *vs.* Lynham, 100 U. S., 483, was a decision to the effect that the treaty with Switzerland controlled and superceded the statutes of Virginia.

No one engaged in that case raised the point, that the entire subject of inheritance of land by aliens was forbidden to the States, but the Judge unconsciously decided the point as we contend when he said:

> (100 U. S., p. 490, top): "Mr. Calhoun says:
> "'Within these limits, all questions which may
> "'arise between us and other powers, be the sub-
> "'ject matter what it may, fall within the treaty-
> "'making power and may be adjusted by it. (Treat
> "'on the Const. and Govt. of the U. S., 204.)'
> "If the national government has not the power
> "to do what is done by such treaties, it cannot be
> "done at all, for the States are expressly forbid-
> "den to 'enter into any treaty, alliance, or confed-
> "'eration.'"

Griffith *vs.* Cody, 113 U. S., 96, was a contest over the possessory right to a cattle range in California, on Government land. It involved only a question of fraud by a dishonest administrator, against heirs, aliens, residents of this State.

Their only inheritance was cattle, horses, and the possessory title to the range.

It did not involve the remotest suggestion of our present Federal question.

The case of Hanrick *vs.* Patrick, 119 U. S., 156, did not involve any reference to the Federal question whether a State can take any action on this subject of in-

heritance of land by non-resident aliens. In that case the laws under which the aliens claimed were laws of the Republic of Texas; laws enacted by an independent nation; and when Texas was admitted as a State those laws were, by the Act of Admission, perpetuated.

But the concession made by all parties in that case (found at page 166), that the laws of the State of Texas would have enabled the aliens to inherit if Hanrick had died later, at once yields up all possibility of our Federal question being in that case. The question here, was not there raised.

We have thus demonstrated that counsel is not supported by a single one of the authorities cited as showing that this constitutional question has been settled against our contention.

The question has not been settled.

On the contrary, this is the leading case on that subject.

No decision of this Court, or any Court of the United States has ever decided the question whether Section 10, Article I, of the Federal Constitution, does or does not prohibit the several States from regulating the right of non-resident aliens to inherit land.

The general principle of law so often quoted in the brief against us, "that to the law of the State we must "look for the rules which govern its descent, alienation "and transfer," cited from 165 U. S., 570, has no bearing here. In not a single one of the cases where that rule is repeated was this constitutional prohibition urged or considered, and the rule has no relation to it.

But, one thing we do say, *i. e.*: That never in its his-

tory has this Court awarded land to a non-resident alien by succession, under a State statute assuming to give that right.

That question is now sharply presented for decision.

The question is, can a State legally prefer a non-resident alien, to native citizens of the United States, to inherit land?

AS TO $89,000 WORTH OF RENTS AWARDED TO FLORENCE ON FINAL DISTRIBUTION; AFTER WE HAD BEEN SUMMONED INTO COURT TO SHOW WHY IT SHOULD NOT BE DONE, OUR ANSWER WAS STRUCK OUT AND OURSELVES DISMISSED WITHOUT A HEARING.

Another part of the bill, to which we have not before referred (side page 68-9), alleges—

That since the filing of the original bill herein, said Florence filed in the Superior Court, in the matter of the estate of said Thomas H. Blythe, her petition for final distribution to her, wherein she prayed for an order distributing to her the residue of said estate then remaining undistributed, amounting to $89,842.94, the same being rents accrued from the real property aforesaid, to which she alleged herself to be entitled only by descent as the sole heir at law and next of kin of said decedent, Thomas H. Blythe, the consideration of which petition was without the jurisdiction of said Court as aforesaid.

That, in her said petition, it was made plainly to ap-

pear to said Court, as the facts then and there were, that said Florence, the petitioner, was born, and continued to be, a British subject and a non-resident alien until after the death of said Blythe and descent cast, and she was not, and never had been, within the United States until after the death of said Thomas H. Blythe and descent cast; and notice of said petition was given to your orators, who were notified and invited to come into Court and show why said petition should not be granted.

That, in obedience and response to said notice, your orators did, on January 16, 1896, file in said Court their answer, wherein and whereby they denied the right of said Florence to have said rents distributed to her, and claimed that they were the heirs and next of kin of said Thomas H. Blythe, deceased, and entitled to said rents.

That said Court, sitting in probate, without right or jurisdiction so to do, heard said petition for final distribution, and *wrongfully struck from the files the answer and opposition* so theretofore *filed by your orators*, and when your orators arose and attempted to object to, and show cause why said petition should not be granted, said Court *refused to permit your orators to be in anywise heard.*

And afterwards said Court granted to said Florence, and made a decree distributing to her, all the residue of said estate, solely upon said petition.

It appears to us a very clear proposition that, under the ruling of Windsor *vs.* McVeigh, 93 U. S., 274, the decree granted by the Court was void as against us, after our answer had been struck out.

We were in Court after being summoned to come in; --we answered, and attempted to support our answer.

We were refused a hearing, and our answer was struck out.

A judgment *pro confesso*, after striking out an answer because of defendant's contempt, is held, in Hovey *vs.* Elliott (N. Y.), 39 L. R. A., 449, affirmed 167 U. S., 409; 42 L. ed., 215, to be void on collateral attack, as a denial of the constitutional right to defend. With this case is an extensive note on the subject of a decision against a constitutional right as a nullity subject to collateral attack.

In the brief on motion to dismiss, on pages 44 to 47, counsel quotes the Code provisions of this State, making decrees of final distribution conclusive, and he industriously holds up to view various late decisions of our Courts firmly maintaining the conclusiveness of such decrees; and, finally, with a show of virtuous indignation, counsel goes outside the averments of the bill, and points out (what was not pleaded), that these appellants appealed to the State Supreme Court also from that decree of final distribution, and that it was dismissed, the Court saying:

> " The appellants are concluded by the decisions
> " of this Court upon their other appeals. They are
> " no longer parties." (Citing:)
>
> Re Blythe, 115 Cal., 553.

Now, counsel ought not to go outside this record in the effort to secure estoppels.

But if that decision, found in 115 Cal., 553, is to be taken notice of at all, we beg leave leave to say that,

although these appellants took an appeal from that decree of final distribution, yet they *never filed the record in the Supreme Court. No record on that appeal ever was filed* there.

The motion to dismiss was *because* the record had not been filed.

So it may appear strange that the Supreme Court of California should have made a decision of bar and estoppel, without any record before them.

But, aside from that, appellants had never had their day in Court. They had been invited in and then driven out without a hearing.

Such is the value of the decree of final distribution.

SECTION 671 OF THE CIVIL CODE OF CALIFORNIA, AS TO ALIENS, IS VOID.

A decree of a State Court on or in execution of a statute that is void is itself void.

Ex parte Siebold, 100 U. S., 376.
Ex parte Yarborough, 110 U. S., 651.

A void judgment is not admissible in evidence.
State of Mo. *vs.* Tiedeman, 10 Fed. Rep., 20-21.

A State statute asserting an authority in excess of the State's jurisdiction is void.

Reddy *vs.* Tinkum, 60 Cal., 459.

A State statute cannot operate beyond the boundaries of the State, nor upon foreign subjects.

Even the Constitution of the United States does not extend its guaranty of the right of trial by jury outside its own territories.

In re Ross, 140 U. S., 453.

At the time of descent cast, Florence was in England, and a British subject. Appellants resided in Arkansas and Kentucky respectively, and were citizens of the United States, and were the next of kin of Thomas H. Blythe. The title to the real estate vested in them at once by descent, before Florence came to this country.

The principal argument made by opposing counsel is, that the State Court of California *awarded* the real property to Florence, right or wrong, and that is the end of the controversy, whether the statutes of the State, under which the award was made, were in violation of the Federal Constitution or not. It does not matter, they say, whether or not the regulation of the descent of real property to non-resident aliens is within the sovereignty of the State (page 56, appellee's brief).

Where the State statute under consideration involves a question of repugnance with the Federal Constitution, its validity will not depend upon State decisions.

Chicago Ry. *vs.* Minnesota, 134 U. S., 456-7.

If a statute is in conflict with the Federal Constitution, and has been upheld by the State Courts, it will be held that it denies due process of law.

Chic., B. & Q. Ry. *vs.* Chicago, 166 U. S., 226.

THE JUDGMENT OF THE STATE COURT, EVEN WHERE THERE IS JURISDICTION, BINDS ONLY ON THE ISSUES RAISED IN THE PLEADINGS.

Findings upon issues not tendered by the pleadings must be disregarded.

Hall *vs.* Arnott, 80 Cal., 349.
Yosemite Valley *vs.* Bernard, 98 Cal., 199.
Phelan *vs.* Gardner, 43 Cal., 306.

It is a fundamental maxim, both in this Court and in Courts of law, that no proof can be admitted on any matter which is not noticed in the pleadings.

A decree entirely outside the issues raised in the record is *coram non judice.*

Windsor *vs.* McVeigh, 93 U. S., 282-3.

In her first petition to establish heirship, Florence did not set up that she was an alien, nor did it appear in the initial pleadings that her guardian was an alien. These facts appeared later in the trial. Thereupon, the Court should have dimissed the petition for want of jurisdiction as soon as they did appear. See Carr *vs.* United States, 98 U. S., 438, where the Court say that "it might not be apparent until after suit brought that "the possession attempted to be assailed was that of "the Government; but when this is made apparent by "the pleadings or the proof the jurisdiction of the "Court ought to cease."

Four things are necessary, jurisdiction being complete, to constitute *res adjudicata:*

1. Identity of the thing sued for, or subject matter of the suit.

2. Identity of the cause of action.

3. Identity of the persons and of parties to the action.

4. Identity of the quality in the persons for or against whom the claim is made.

2 Black on Judgments, Sec. 610.

Florence did not set up in her initial petition in the probate proceedings that she was an alien and illegitimate, or that her guardian was an alien.

She did not claim in the quality of an alien. Nor was the cause of action the same. The State Court has not in the litigation inaugurated by her, passed upon the legal effect of her *quality as an alien.* She cannot hide this quality in a suit, and claim that a decision in her favor in such a suit where such quality is hidden binds the heirs at law. Florence was silent on alienage in filing her first petition, claiming, presumably, as a citizen.

Such claim laid no foundation in the pleadings for a Federal question, and, therefore, looking at such pleadings, this Court found no jurisdiction in the case of Blythe *vs.* Ayres, 167 U. S., on writ of error.

Kipley *vs.* Illinois, 170 U. S., 182-7.

The jurisdiction to re-examine the final judgment of a State Court cannot arise by inference.

Louisville and Nashville R. R. *vs.* Louisville, 166 U. S., 715.

When these appellants took a writ of error from this Court to the Supreme Court of California, hoping to get

this Court to reverse the decree of distribution, whereby Florence had acquired possession of this land, Florence's counsel, whose names are signed to the moving brief herein, seemed very familiar with the rule last mentioned. These appellants in their brief there attacked the Section 671, C. C. of California, as bing void; and thought that this Court would take notice of its being so.

But the present counsel for appellee there sharply contended that, as the precise Federal question had not been raised in the trial Court, this Court had no jurisdiction.

We invite special attention to what counsel there said. It was in Case No. 804, October Term, 1896, in the brief filed by appellee to dismiss for want of jurisdiction; this language is used, on page 25:

> "VI. If it were a Federal question whether a "State could give non-resident aliens the right to "inherit land within the State, no such question "was raised in any form in the proceeding on dis- "tribution, sought to be reviewed."

This Court evidently took that view, for it dismissed the writ.

As a result, Florence's decree of distribution, her muniment of title, was safe from attack on appeal; and when we come to attack it in this suit, on the ground that it is void, the same counsel, in their too great zeal to bring *res judicata* to bear, forget the claim they formerly made, and now exclaim that all these things were litigated in the proceedings for distribution.

On page 56 of the moving brief herein, counsel say:

> " The question of the capacity of the alien to in-
> " herit *was necessarily involved by the decrees that she*
> " *did inherit.*"

And, on page 74:

> " Now, this question was necessarily involved in
> " the decrees of the Superior Court. For it cannot
> " be disputed that appellee's capacity to inherit
> " *was necessarily involved in the decrees that she did in-*
> " *herit.* Being necessarily involved, it would not
> " matter whether the facts were actually litigated
> " or not. In the subsequent suit in the Federal
> " Court to quiet title to the property, the probate
> " decrees were conclusive of everything which
> " might have been litigated."

When directly appealed from, the Federal question had not been involved at all; but when the decree of distribution is needed as a bar, they say the Federal queston was necessarily involved, so as to have that Federal question properly barred; and this, though appellants, after being summoned, were not permitted to be heard.

But by what right does counsel now argue that the Federal question involved in this case was involved and determined in those probate proceedings?

The bill in this case alleges (side page 67):

> " Your orators allege that none of the constitu-
> " tional or other objections aforesaid, to the juris-
> " diction of said Court or the validity of said sta-
> " tutes, as applicable to said Florence, were de-

"cided or considered by the Court upon the hear-
"ing of said petition for distribution."

Florence filed no pleading in the Circuit Court to this bill, except a motion to dismiss it for want of jurisdiction.

That motion admits all the allegations of the bill as true, so counsel has no right to dispute the facts there averred. They are to be taken as true.

Counsel is not entitled to deny what the bill affirms, and ask this Court to listen to a protracted argument upon it.

The bill showing diverse citizenship, and land within the jurisdiction of the Court, sets up facts to show that defendant is in possession of land belonging to themselves; that she obtained said possession through void judicial proceedings based upon a void statute, and showing that the reason why the statute is void is because it is repugnant to the Constitution of the United States; and asking that her judgments be ignored and that complainants have possession of their land..

Notwistanding the double showing of jurisdiction made out, first by the diverse parties and second by the essentially Federal character of the question involved, Florence's counsel move to dismiss for want of jurisdiction.

The Court decides that it has no jurisdiction, and dismisses the bill, and gives to complainants a certificate showing Federal questions.

Complainants appeal, and Florence's counsel move to dismiss because of the lack of jurisdiction.

In other words, this Court's jurisdiction to inquire

into the jurisdiction of the Circuit Court is denied, where the Circuit Court dismissed for want of jurisdiction.

And, in support of the claim that this Court has no jurisdiction, on appeal, to enquire into the jurisdiction of the Circuit Court, counsel not only argue the cause from end to end, but allege the principal fact in the case (of this question not having been before litigated) to be just the reverse of what the case shows it; and, to wind up, assert that the Circuit Court actually tried and decided the case against us on the merits.

On page 100 of the moving brief herein, we find these words, concerning the action of the Circuit Court:

> "The record shows that *it did, in fact, assume "jurisdiction of the cause, and did, in fact, decide it "on the ground of want of equity jurisdiction.*"

This claim is made, although there was neither plea, answer, or demurrer filed by said Florence therein.

IT IS NOT PRETENDED THAT THE STATE COURT WAS EVER CALLED UPON BY FLORENCE TO DECIDE ON THE VALIDITY OF SECTIONS 671-672 OF THE CIVIL CODE OF CALIFORNIA.

The defendants (these appellants) could not raise these questions, because the initial proceeding to establish heirship was a special, practically an *ex parte*, proceeding, in which defendants (appellants here) were unwilling defendants. The whole case was tried on the pleadings that Florence chose to put in.

The validity of these statutes was, in the State re-

cord, neither questioned nor decided, hence their validity has not been drawn in question or passed upon to this day.

Leeper *vs.* Texas, 139 U. S., 463.

Claiming a right under a statute does not put in issue the *validity* of the statute.

United States *vs.* Seymour, 153 U. S., 353.
Ferry et al. *vs.* King County, 141 U. S., 668.

THE JURISDICTION OF THE HONORABLE COURT BELOW DEPENDED UPON DIVERSE CITIZENSHIP, AND THE VALUE OF THE PROPERTY INVOLVED, AND THE SITUATION OF SAID PROPERTY WITHIN THE NORTHERN DISTRICT OF CALIFORNIA, AND NOT UPON WHAT HAD BEEN DONE IN RESPECT OF THE PROPERTY BY A STATE COURT OF CALIFORNIA, PREVIOUSLY.

The claim of Florence Blythe to this estate is a fraud upon the laws of California and of the United States, and upon complainants, and is so charged in the bill. The arguments made in favor of Florence in this case, that a Federal Court cannot look into and through probate proceedings when their conclusiveness and binding force are challenged, have been made and answered many times before in the history of this Court.

In the case of Arrowsmith *vs.* Gleason, 129 U. S., 98, the contention of appellant is met and decided adversely to her; thus:

"But it is insisted that the Circuit Court of the "United States, sitting in Ohio, is without jurisdic-

"tion to make such a decree as is specifically "prayed for, namely: a decree setting aside and "vacating the orders of the Probate Court of De- "fiance County. If by this is meant only that the "Circuit Court cannot, by its orders, act directly "upon the Probate Court, or that the Circuit Court "cannot compel or require the Probate Court to "set aside or vacate its own orders, the position "of the defendants could not be disputed; but it "does not follow that the right of Harmening in "his lifetime, or his heirs since his death, to hold "these lands against the plaintiff cannot be ques- "tioned in a Court of general equitable jurisdiction "upon the ground of fraud. If the case made by "the bill is clearly established by proof, it may be "assumed that some State Court of superior juris- "diction and equity powers, having before it all "of the parties interested, might afford the plain- "tiff relief of a substantial character, but, whether "that be so or not, it is difficult to perceive why "the Circuit Court is not bound to give relief ac- "cording to the recognized rules of equity as ad- "ministered in the Courts of the United States, "the plaintiff being a citizen of Nevada, the de- "fendant a citizen of Ohio, and the value of the "matter in dispute, exclusive of interest and cost, "being in excess of the amount required for the "original jurisdiction of such Courts."

In Payne *vs.* Hook, 7 Wall., 425, this Court observes, that the constitutional right of a citizen of one State to sue a citizen of another State in the Courts of the United States would be worth nothing if the Court in

which the suit is instituted could not proceed to judgment.

On page 99 of Arrowsmith case it is said, the later decisions of this Court show that the proper Circuit Court of the United States may, without controlling, supervising, or annulling the proceedings of State Courts, give such relief as is consistent with the principles of equity.

On page 100, it is said, the fact of being a party does not estop a person from obtaining, in a Court of equity, relief against fraud; it is generally parties who are the victims of fraud.

The complainants in this case have never submitted their claim to the estate of Thomas H. Blythe, but have appeared only to contest the right of Florence, as she set it up in her pleadings. At no time has the question been presented to any Court, whether Section 671 of the Civil Code is constitutional. The statute of the State under which she instituted proceedings, and under which she appeared without disclosing her character, could not oust the equity jurisdiction of the Federal Courts.

Hayes *vs.* Pratt, 147 U. S., 570.

THE TREATY-MAKING POWER.

This controversy is really narrowed down by appellee to a single proposition. The bill charges in appropriate language to give this Court jurisdiction (of the

question whether Section 671 of the Civil Code of California is valid *quo ad* inheritance of land by non-resident aliens), that said statute is void. It is charged in the bill that California has no jurisdiction to enact, nor the Courts of California jurisdiction to enforce said statute. This is a fact well pleaded.

> Baltimore & Potomac R. R. Co. *vs.* Hopkins, 130 U. S., 210. See, also, p. 224.

This fact being admitted, judgment should go for appellants on the face of the record. Appellee upholds this statute solely and only on the ground that no treaty exists in conflict with it. They say, in their brief filed in the Honorable Court below:

> "The State law concerning aliens is valid until "the Senate does exercise the treaty-making "power."

COUNSEL SAY THAT SECTION 671 IS NOT A TREATY.

This is so only because the Constitution forbids it to be a treaty. Its language deals with the subject of treaties. Suppose that it be amended so as to declare that all French subjects may inherit land in California, provided France extends the same privileges to residents of California. Such a statute could as well be enacted as the present one. Treaties are the declarations of reciprocal rights by different nations, within the region of international intercourse. Sec. 671 is within the treaty field. As to aliens, it spends its force entirely in that field.

REQUEST TO DECIDE THE CASE.

Counsel for appellee, in the concluding paragraph of their brief, on page 100 thereof, respectfully ask for an expression of this Honorable Court's opinion upon the question of the non-resident alienage of appellee at the time of descent cast. We respectfully join in that request, as we do not wish to prolong this litigation an unnecessary hour. In making such decision, the Court will see that the issue is a single and narrow one: Has California jurisdiction over non-resident aliens, either to adopt them or vest them with the right to take land in California in fee simple, and remain thereon forever at home, in defiance of the power of the Federal Government to exclude them from the country? Opposing counsel, in their brief in the Circuit Court in this case, which we feel at liberty to quote, say:

> "As we read the bill, it is not pretended that "the treaty-making power has been so exercised as "to affect the legislation of California in regard to "aliens, and it must be held that, as in the case of "a State insolvent law, the law is valid and proper "until Congress exercises the power of regulating "bankruptcies, and even thereafter, except only in "so far as the insolvent conflicts with the bank-"rupt law. So, the State law concerning aliens is "valid, till the Senate does exercise the treaty-"making power."

We construe this language to admit, as well as the language of the present brief, page 63, that the regulation of the descent of real property to non-resident aliens is within the treaty-making power of the Fed-

eral Government, but that the State may exercise the power to so regulate, until a treaty on that subject be actually made. That is to say, that the power is dormant, if no treaty be made, and the State may exercise it while it is so dormant.

If the power be not dormant, or concurrent in the State and Federal Governments when no treaty exists regulating said descent, appellee has no title to the property in question.

Such power cannot be dormant.

> Homes *vs.* Jennison, 14 Peters, 576.
> Wabash, etc., Ry. Co. *vs.* Illinois, 118 U. S., 558-575.

Even if it were a dormant power, it is a (dormant) Federal power, and not a dormant State power; and like the power to make war, can never be exercised by the State.

CONCLUSION.

In conclusion, we will remark, that opposing counsel charge that much, if not all, of the arguments employed by complainants to make good their claims are wild imaginings, and further, they say, in conclusion, that if there were a treaty, it would be in their favor. This prophecy can hardly escape the stigma of wild imagination. It is also charged that complainants are abusing the processes of the law in pressing their claim. It will be observed by this Honorable Court

that the facts are, that complainants are the nearest blood relatives of the deceased Blythe; that they are citizens of the United States, legally entitled to inherit the real estate in controversy under the laws of California and Section 1978 of the Revised Statutes of the United States; that they have never been the *actors* in presenting their claim to the said property in the State Court, but have appeared there as defendants merely, in special proceedings that could not be removed to the Federal Court, at all times denying appellee's title.

Complainants have never had their day in Court on the issues and principles of law upon which they rely to make good their claim. This Honorable Court held in Lawrence *vs.* Nelson, 143 U. S., 223, that there was a difference in the binding force of voluntary and involuntary proceedings. The special proceedings of an administrative nature were inaugurated in the Probate Court of California, by appellee giving notice thereof by publication. It is true that apellants appeared therein, but only to deny appellee's title. The true relation, if any at all, of appellee to Blythe was kept out of sight, and not by appellee set up or stated in her initial pleading, judgment upon which was and is the only foundation for all subsequent action of the State Court. Complainants now come into the Federal Court, as they have a constitutional right to do, and for the first time after the perfunctory administration is closed, set forth their title, and the circumstances under which appellee worked her way through practically *ex parte* proceedings under the State law. Surely, appellee presents no persuasive

equity in her favor. She comes here as the unauthenticated offspring of a foreign land. Opposing counsel, in the poetry of their zeal to get this property, say, that if there was any treaty, it would be in our (their) fa-
" vor, for no nation—and certainly not Great Britain—
" would be guilty of the barbaric folly of stipulating for
" the imposition of disabilities upon her own subjects" (p. 64 of opposing brief).

This observation is full of interest. It concedes, first, that appellee is a British subject under disability. It implies great admiration for Great Britain. The writer, for the moment, forgot that it is admitted that no law exists in England whereby illegitimates may or can be adopted in England. It seems that Great Britain has not extended legal indulgence to promiscuous intercourse, and has not obliterated the distinctions in legal favor between persons born within and without lawful wedlock. Counsel forgets that the disability took place in England, for which England furnishes no relief at home. What justification, then, is there for the hypothesis that, if there were a treaty, England would insist that a foreign country would be more tender of the frailties of her own subjects than she is of such subjects at home. Human history furnishes no instance where one nation has allowed its politeness to another nation to be so taxed that it postponed the rights of its own respectable and decently born citizens to the ill-begotten of said other nation.

If this Honorable Court measure the legal rights of appellee to real property in this country with her rights to take similar property in her own home, her claim will disappear.

There is no strength in the censure visited upon appellants for respectfully claiming as next of kin in the Courts of their country, what belongs to them, though, in so doing, they offend one having no claim thereto in law or in ethics.

This Court has complete jurisdiction of this appeal, and so, the motion to dismiss should be denied.

A motion to affirm is never granted unless it is manifest that the appeal is for delay only, or that the question on which jurisdiction depends is so frivolous as not to need further argument.

Neither of those conditions exists on this appeal.

The question which we raise is one of great national importance, and upon its solution much may depend in the future history of this Union.

It has never been considered by this Court before.

Wherefore, the motion to affirm should be denied.

Respectfully submitted,

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Original

No. 364.

Brief of McKisick for Appts. (Co

IN THE

Supreme Court of the United States.

Filed Jan. 30, 1899.

OCTOBER TERM OF 1898

JOHN W. BLYTHE and
HENRY T. BLYTHE,
APPELLANTS,

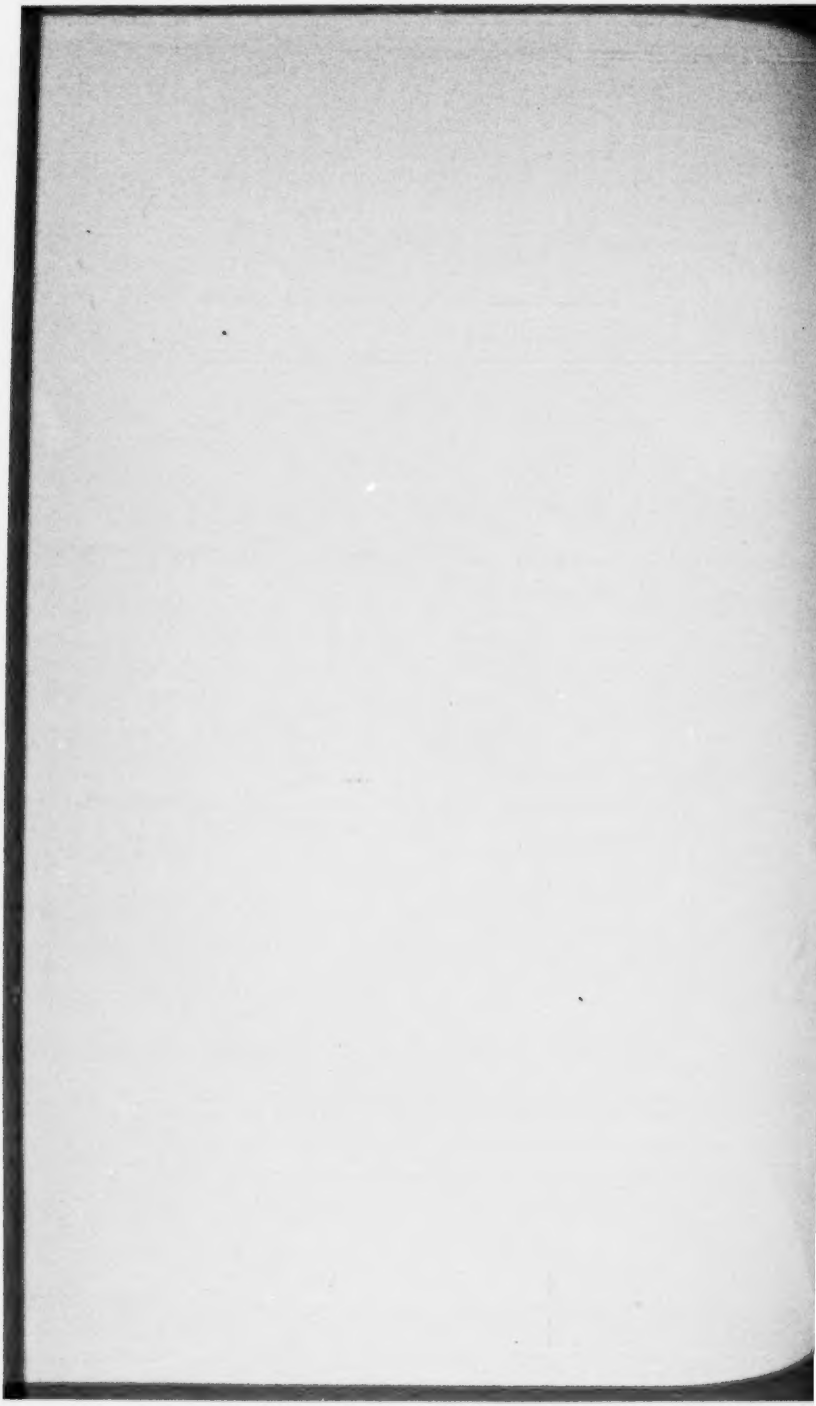
vs.

FLORENCE BLYTHE HINCKLEY,
APPELLEE.

16,952

Brief in Reply to Motion to Dismiss the Appeal

L. D. McKISICK,
Counsel for Appellants.



IN THE

Supreme Court of the United States

October Term, 1898. No. 367.

JOHN W. BLYTHE and
HENRY T. BLYTHE,
Complainants and Appellants,

vs.

FLORENCE BLYTHE HINCKLEY,
Respondent and Appellee.

REPLY TO MOTION TO DISMISS.

This appeal comes here from a decree of the Circuit Court of the United States for the Northern District of California, dismissing the suit for want of jurisdiction.

The case is this: Thomas H. Blythe, a naturalized citizen of the United States, died unmarried and intestate in the City of San Francisco in the year 1883, leaving the real estate in controversy to descend to his heirs.

In December, 1895, John W. Blythe, a citizen of the State of Kentucky, and Henry T. Blythe, a citizen of the State of Arkansas, who are admitted on the record

to be heirs at law and next of kin of the said Thomas H. Blythe, filed their bill in the Circuit Court against the respondent, Florence Blythe Hinckley, a citizen of the State of California, to have their title to the real estate, described in the bill, quieted. This bill was filed after the decision of this Court was made in the case of More *vs.* Steinbach and reported in 127 U. S., page 70, to which we refer. Nine days after, namely, December 12, 1895, complainants filed an amended bill.

Afterwards, the complainants being advised by a certain plea in bar filed by the respondent to their amended bill of the grounds of the adverse claim of the respondent, which would be relied upon by her to defeat complainants' right, obtained leave to file a second amended and supplemental bill.

An inspection of the bill (pp. 5 to 13 of the record) will show that complainants alleged that they were the heirs and next of kin of Thomas H. Blythe; that the conflicting claim of the respondent was founded upon certain special proceedings and judgments thereon of the Superior Court in probate of the City and County of San Francisco and of the Supreme Court, which judgments they alleged were *void* for the reason that upon the facts stated in the bill the State Courts had no jurisdiction to render them; that complainants are not precluded from prosecuting their action in this Court, nor is the Court precluded from entertaining jurisdiction. (Record, p. 10, ff. 19-20). This bill was filed January 14, 1897. (Record, p. 13.) To this bill the respondent filed no plea, no demurrer, no answer; but on February 15, 1897, she served a notice on the solicitors of complainants that on March 1, 1897, she would

"move the Court * * * for an order dismissing "said suit. 1st. That, as appears from the second "amended and supplemental bill of complaint of com- "plainants filed in the above entitled suit, this Hon- "orable Court has no jurisdiction of the matters and "things in the alleged cause of action in said second "amended and supplemental bill of complaint stated." (Record, p. 14.)

Ten months after said motion was made, namely, December 6, 1897, the Court sustained the motion and ordered the bill dismissed (Record, p. 28), with leave to complainants to amend. They thereupon filed a third bill, which was also dismissed and a final decree entered dismissing all of the bills "for want of either Fed- "eral or equity jurisdiction." (Record, pp. 40, 41.)

The administrator of Thomas H. Blythe was not made a party, for the sufficient reason that an administrator never claims adversely to the heirs at law of the decedent.

As this is a suit in equity between citizens of different States involving title to real estate of the value of $3,000,000 within the jurisdiction of the Court, it was the duty of the Court to hear and determine the controversy, unless the allegations of the bill ousted the jurisdiction.

That is the sole question for this Court to decide on the motion to dismiss.

The second and third amended and supplemental bills allege that the adverse claim of the defendant to the real estate in controversy is grounded solely upon the judgments and decrees of the State Courts. The bills were not filed to have the Fed-

eral Court review or reverse those judgments. That is not the purpose of the bill at all. The claim of the complainants is, and the bills allege, that the judgments are absolutely void, and that consequently the adverse claim of the appellee is false and groundless and without warrant of law, and that the appellee has not now and never has had any right, title or interest in or to the real estate in controversy as heir at law of Thomas H. Blythe, or otherwise.

When the complainants came into Court and alleged that they are the next of kin and heir at law of Thomas H. Blythe, and as such they inherited the real estate sued for, all of which the appellee by her motion admits to be true but sets up an adverse claim based upon certain judgments which the complainants allege are void, did not the Court have jurisdiction to inquire into the validity of the adverse claim and determine for itself whether the judgments set up in defense of and in sup- of the adverse claim were or were not void?

The jurisdiction of a Court to render judgment under which a party claims, or defends, can always be inquired into by any Court in which the judgment is relied on, and it is the duty of the Court to determine for itself upon such inquiry whether or not the Court which rendered the judgment relied on had jurisdiction of the parties and of the subject matter, *and whether there was any law in existence which authorized the judgment to be rendered.* If either of these elements be wanting upon the face of the record, the judgment is absolutely void, not voidable, and, in the language of the Supreme Court of California, in the case of Forbes *vs.* Hyde, 31 Cal., on p. 348, "may be attacked

"anywhere, directly or collaterally, whenever it pre-
"sents itself, either by the parties or strangers. It is
"simply a nullity, and can be neither the basis nor evi-
"dence of any right whatever."

That question of jurisdiction was for the Circuit Court to decide in this action, no matter what the State Courts may have decided, for, in the language of the Supreme Court of California, in the case of McMinn *vs.* Whelan, 27 Cal., p. 513: "It is a fundamental rule that "no Court can acquire jurisdiction by the mere asser-
"tion of it, or by deciding that it has it."

A judgment in violation of law is a nullity. Page *vs.* Naglee, 6 Cal., on p. 245.

So a judgment in favor of a party who has no right to sue is void. Sullivan *vs.* Mier, 67 Cal., 264. A judgment in a special proceeding without jurisdiction is void, and may be collaterally attacked. Mulligan *vs.* Smith, 59 Cal., 206, 233.

Where the Court has jurisdiction of the parties, and of the subject matter, if it exceeds its jurisdiction in its judgment, the judgment is void for the excess. Bigelow *vs.* Forrest, 9 Wall., 339; Shriever *vs.* Lynn, 2 How., 59.

"But it is an equally well settled rule in juris-
"prudence that the jurisdiction of any Court exercising
"authority over a subject may be inquired into in every
"other Court, when the proceedings in the former are
"relied upon and brought before the latter by a party
"claiming the benefit of such proceedings. The rule
"prevails, whether the decree or judgment has been given in a Court of Admiralty, chancery, ecclesiastical "Court, or Court of common law, or whether the point

"ruled has arisen under the law of nations, the prac-
"tice in chancery, or the municipal laws of States."
Williamson *vs.* Berry, 8 How., 539-540. If this Court will examine the cases cited and commented upon in Williamson *vs.* Berry, on pages 540-541, it will have no doubt that the Circuit Court did have jurisdiction, and that it was its duty to inquire into the jurisdiction of the State Courts to render the judgments attacked in the bill. If the Circuit Court had exercised its jurisdiction, it does not necessarily follow that it was its duty to declare those judgments void; it might have decided either way, but we claim that it erred in deciding that it had no jurisdiction and in dismissing the bill on that ground alone.

The authorities are conclusive to the point that, although the Court which rendered the judgment attacked may have had jurisdiction of the parties and of the subject matter, it may exceed its jurisdiction in the judgment itself, as was decided in Bigelow *vs.* Forrest, 9 Wall., 339, supra. Day *vs.* Micon, 18 Wall., 160; Ex parte Lange, 18 Wall., 163, 176, 177, 178.

The bill also attacks certain laws of the State of California. Certainly the Circuit Court, as between these parties, had jurisdiction, and it was its duty, to inquire into the validity of those laws, and if it had found them to be unconstitutional they were no laws, and if the judgments were based upon or rendered under or pursuant to void laws the judgments themselves were void. As was said by this Court in Ex parte Siebold, 100 U. S., 376: "An unconstitutional law is void and is no
"law. An offense created by it is no crime. A con-
"viction under it is not merely erroneous, but is illegal

"and void, and cannot be a legal cause of imprison-
"ment." To same effect Ex parte Yarbrough, 110 U. S., 54; Boyd *vs.* Alabama, 94 U. S., 645.

II.

The Circuit Court has jurisdiction to inquire into and decide the question whether or not a judgment between the same parties, involving the same subject matter, when properly pleaded, constitutes a bar or an estoppel in a subsequent suit between the same parties involving the same subject matter. That principle or rule of law is axiomatic in this Court.

In the great case of Aspden *vs.* Nixon, 4 How., 466, 497, 498, one of the most thoroughly and exhaustively argued cases to be found in the reports, and which would be clearly analogous to this but for the fact that there was a will in that case, two decrees were relied upon.

On pages 497-498 the Court says: "As applicable to "such state of facts, the rules of evidence governing "Courts of justice are that a judgment or decree set up "as a bar by plea, or relied on as evidence by way of "estoppel, to be conclusive, must have been made (1) by "a Court of competent jurisdiction." That raises the question: Was the Superior Court of the City and County of San Francisco, sitting in probate, and administering the State probate law, a Court of competent jurisdiction to determine the questions of international law involved in this case? The proceedings in the Probate Court were special proceedings under Sections 1663-1664 of the Code of Civil Procedure of the State, and was not a civil action within its general jur-

isdiction at all. The Supreme Court of California, in the case of Smith *vs.* Westerfield, 88 Cal., 374-378, et seq., gave careful consideration to the construction and operative effect of this Section 1664, and we respectfully appeal to this Court to read and consider the opinion and decision of the Court in that case, and determine for itself whether or not the Superior Court was by its jurisdiction competent to go beyond and outside of the limits of California and invest the appellee with inheritable blood *eo instanti* the death of Thomas H. Blythe. Did not the Circuit Court have jurisdiction to inquire into and decide that question? "(2) between " the same parties; (3) for the same purpose."

The question for the Circuit Court and for this Court to determine, is this suit for the same purpose as was the suit of Blythe *vs.* Ayres, 96 Cal., 532, 557, in which the judgment was rendered upon which the adverse claim of the appellee is grounded? The Supreme Court of California answered that question on page 557, when it said:

"Plaintiff's claim is based upon Sections 230 and " 1387, respectively, of the Civil Code of California."

The Court then quotes the sections. Not a word is to be found in either as to the competency of a non-resident alien child, incapable of becoming a naturalized citizen at the death of Thomas H. Blythe, when the real estate in controversy descended to and vested in his next of kin and heirs at law.

A few words upon that opinion. There is no pretense that Thomas H. Blythe ever married Julia Perry, the mother of appellee, and yet on page 560 the Court said: "2. In a case of *legitimatio per subsequens matri-*

"*monium*, the place of marriage does not affect the "question."

The opinion then devotes fifteen pages to a discussion of that question, the baldest obitur to be found in any case, always excepting the opinion of Chief Justice Marshall in Marbury *vs.* Madison, 1 Cranch., 137, in which the Chief Justice wrote a splendid and luminous commentary on the Constitution, in a case in which the Court had no jurisdiction of the subject matter. But on page 563 of 96 Cal. the Court capped the climax when it said:

"This section takes a wide range; its operation is "not confined within State lines; it is as general as "language can make it; oceans furnish no obstruction "to the effect of its wise and beneficent provisions; it "is manna to the bastards of the world." (Overruling Reddy *vs.* Tinkum, 60 Cal., 458.)

Now, the Court did not feed manna to this particular bastard, but it did attempt to give to her $3,000,000 worth of real estate which had descended to and belongs to the complainants.

We say that neither upon principle nor authority could the judgment attacked by the bill have been successfully set up by plea, or answer, as a bar or estoppel, by the appellee in support of her adverse claim.

If the Circuit Court, in the exercise of its unquestioned jurisdiction, had examined into the judgments relied upon as they are stated in the bill, it would have certainly found that they do not come within the rules necessary to create a bar or an estoppel. The Court would have found *that the point of controversy* must be the same in both cases, and must be deter-

mined on its merits. Packet Co. *vs.* Sickles, 24 How., 333; same case, 5 Wall., 580; United States *vs.* Lane, 8 Wall., 185; Russell *vs.* Place, 94 U. S., 606; Mobile County *vs.* Kimball, 102 U. S., 691;. The case of Hoboken *vs.* Pen. R. R., 124 U. S., 656, involved title to same land, or part of same, which was involved in 7th Vroom., 540, and between same parties or privies. The Supreme Court, on appeal from the Circuit Court, would not follow the New Jersey case in 7 Vroom. (Carroll *vs.* Carroll, 16 How., 284-286-7.)

Section 1911, Code of Civil Procedure of California, declares:

"That only is deemed to have been adjudged in a for-
"mer judgment which appears on its face to have been
"so adjudged, or which was actually and necessarily
"included therein, or necessary thereto." This is but a declaration of the general law. Ferrea *vs.* Chabot, 63 Cal., 564, 570; Davis *vs.* Brown, 94 U. S., 423; Altschul *vs.* Polack, 55 Cal., 633; Windsor *vs.* McVeigh, 3 Otto, 274. Applicable to action of the Superior Court in refusing to allow complainants to contest the right of appellee to have the real estate distributed her. See record, p. 12, denying complainants' right to be heard.

That the Circuit Court had jurisdiction to inquire into and determine the questions as to the scope and operative effect of the judgments presented by the bill is beyond controversy, and its decision to the contrary is manifestly erroneous. This Court has jurisdiction to examine the decree appealed from. There is no pretense that the appeal was not regularly taken. No just pretense that the complainants did not have the right, upon several grounds, to appeal direct to this Court

under Section 5 of the Act of 1891 establishing Circuit Courts of Appeals; no question that complainants did not do every act and thing required by the law and the rules of this Court to perfect their appeal; no question that they were not *rectus in curia* when notice of this motion to dismiss or affirm was given and served.

We have been served with a copy of a 100 page argument, not upon the motion to dismiss, but in support of the motion to affirm.

The argument commencing on page 48, and extending to page 78, is a mere *petititio principii*, for it assumes that this controversy involves only a State question, which we deny. The State statutes in regard to aliens are not within its power to enact. From July 4, 1776, to 1789, when the Constitution became the Supreme law of the nation, there were thirteen free, independent, sovereign States. Unless that sovereignty, as to international questions, was merged into the National sovereignty, we now have forty-six independent sovereign States, while we contend that, under the Constitution, we have one sovereign National Government and forty-five States with sovereignty limited to their own territory and over their own citizens and domestic affairs, no authority over citizens of other States within their own States, nor over citizens or subjects of foreign nations. If these axiomatic principles of our national government are truly stated, the argument is destitute of any merit.

Upon examining that argument, the Court will find that it confounds an inextricable mass of questions arising out of State sovereignty, National sovereignty,

the Constitution and Statutes of the State of California, the Constitution and Statutes of the United States, and international, common and probate law. It also confounds the question of the jurisdiction of Courts to inquire , collaterally, into the validity and operative effect of judgments or decrees rendered in one tribunal by another, and the jurisdiction of one Court to review or reverse judgments or decrees rendered in another Court. In fact, the argument confounds all distinctions. It contains propositions of law, as applying to the facts of this case, stated in a sort of *ego sum lex* way that are astounding. This is notably so when dealing with State sovereignty over its domestic affairs. Counsel cite many authorities in support of the proposition stated in the argument. This Court has stated that rule or doctrine many times in various ways, sometimes with, and sometimes without qualifying it, but when without qualification always in cases where no rights were claimed by citizens of other States. The case of United States *vs.* Fox, 94 U. S., 315, 320, one of the cases cited in the argument, states the doctrine as broadly as any case can state it. To prove the truth of this we quote the whole paragraph relating to the subject, to wit, on page 320:

"The power of the State to regulate t[illegible]ure of "real property within her limits, and the [illegible]es of its "acquisition and transfer, *and the rules of its descent*, "and the extent to which a testamentary disposition "of it may be exercised by its owners, is undoubted. It "is an established principle of law, everywhere recog-"nized, arising from the necessity of the case, that the

"disposition of immovable property, whether by deed,
"*descent*, or any other mode, is exclusively subject to
"the government within whose jurisdiction the prop-
"erty is situated. McCormick *vs.* Sullivan, 10 Wheat.,
"202. The power of the State in this respect follows
"from her sovereignty within her limits as to all mat-
"ters over which jurisdiction has not been expressly
"or by necessary implication transferred to the Fed-
"eral Government. The title and modes of disposition
"of real property within the State, whether *inter vivos*
"or testamentary, are not matters placed under the
"control of Federal authority. Such control would be
"foreign to the purposes for which the Federal Gov-
"ernment was created, and would seriously embarrass
"the landed interests of the State."

We agree with everything contained in the quotation except the words "rules of its descent," which we have italicized. That was probably a slip of the pen, for it never has been law since the Sixth Amendment to the Constitution, in our opinion, and most clearly not since the Fourteenth Amendment to the Constitution and Section 1978 of the Revised Statutes. To illustrate: suppose the Legislature of California should enact a statute declaring that upon the death of a citizen of the State intestate, owning real estate within the limits of the State, leaving children, some of whom are citizens of this State and others who are citizens of other States, the children who are citizens shall inherit the whole estate to the exclusion of the non-resident children. The right of the non-resident children would be protected against such a law by the express provisions of the United States Constitution and the Revised

Statutes. Admit that the State is sovereign over its own citizens as to its domestic affairs, it is not sovereign over citizens of other States, nor is it sovereign over aliens who were never in the State until after death and descent cast.

Suppose a case of the kind should occur, and a citizen of Kentucky, who was one of the children of the intestate decedent, should come to California, and, finding the estate of his father being administered in the Probate Court should go into that Court and file a petition to have his portion of the real estate distributed to him, and the Court should deny his right, and on appeal the Supreme Court should affirim the decree. Would the judgments be simply erroneous, or would they be void? Would they bar or estop him from filing a bill in the Circuit Court to have his title to his portion of the land quieted? A judgment contrary to a positive law is void. A void judgment is no judgment and need not be appealed from.

We say the complainants have a clear right to have the validity of the judgments mentioned in the bill inquired into, and the Circuit Court erred in dismissing the bill without having made that inquiry.

But, in the broad way the Court states the proposition, the State Legislature could deny to an alien protected by treaty the right to take by descent.

We submit that these complainants came frankly and openly into the Circuit Court and attacked those State Court judgments, and challenged the appellee to set them up in support of her adverse claim to the real estate in controversy. She declined the challenge, and attempted to answer it by resorting to a technical ob-

jection that the Circuit Court had no jurisdiction of complainants' cause of action; in other words, she made no attempt to support her adverse claim. And yet, on page 100 of their argument, counsel say they submit "whether this entire litigation in the Federal "Courts is not so entirely groundless as to amount to "an abuse of the process of the Court." We say, in view of the facts on the record, that it is a bold thing to say. Then again, they say, on the same page: "This "question was really decided by the decision dismissing "the writ of error, if we correctly apprehend the mat- "ter. But unfortunately for us the Court seemed to con- "sider the question so plain as not to require an opin- "ion (167 U. S., 746)." That decision is cited four times in the argument, evidently with the hope that the Court will be persuaded that it did have jurisdiction to decide and did decide the case on its merits, and that it did not, merely, dismiss the writ of error for want of jurisdiction. Such an argument may not be an abuse of the process of the Court, but it is certainly in contempt of the settled decisions of the Court. By the judgment of this Court (167 U. S., 746), the writ of error was dismissed for want of jurisdiction. The reports contain a great number of cases in which the writ was dismissed for want of jurisdiction, in not one of which did the Court decide that it had jurisdiction of the subject matter in controversy. In the terse language of Mr. Justice Swayne in Mayor *vs.* Cooper, 6 Wall., 250, the Court said: "If there were no jurisdiction, there "was no power to do anything but to strike the case "from the docket. In that view of the subject, the "matter was as much *coram non judice* as anything

"else could be, and the award of cost and execution "was consequently void."

Therefore, if "the question was really decided by the "decision dismissing the writ of error," the decision and judgment was void. We do not believe the Court will concur with the counsel in their construction of that decision.

Section 5 of the Act establishing Circuit Courts of Appeals provides:

"That appeals or writs of error may be taken from "the District Courts or from the existing Circuit Courts "direct to the Supreme Court in the following cases:

"In any case in which the jurisdiction of the Court is "in issue; in such cases the question of jurisdiction "alone shall be certified to the Supreme Court from "the Court below for decision. * * *

"In any case that involves the construction *or* ap-"plication of the Constitution of the United States.

"In any case in which the constitutionality of any "law of the United States, or the validity or construc-"tion of any treaty made under its authority, is drawn "in question.

"In any case in which the Constitution *or* law of a "State is claimed to be in contravention of the Consti-"tution of the United States."

The statute gave complainants the right of appeal from the decree of the Court below upon each of the grounds above stated. The petition, prayer and order allowing the appeal are on pages 41-42 of the record, and show that the appeal is a general appeal under said Section 5.

The questions of jurisdiction certified up by the Cir-

cuit Court, and the assignment of errors on the record, show beyond question that the Circuit Court did have jurisdiction of the parties and of the subject matter, and the record shows that this Court has jurisdiction of this appeal, and we respectfully submit that the appellants have a constitutional and statutory right to have the judgment of this Court upon the merits of their case.

"Jurisdiction is the right to hear and determine; not "to determine without hearing." Windsor *vs.* McVeigh, 3 Otto, 274.

It is a very grave invasion of the Constitutional rights of parties who, being *rectus in curia*, are denied the right of being heard in support of their right and claim to the subject matter in controversy. That is conspicuously so when, in a case like this, it is admitted on the record that the claimants are the next of kin and heirs at law of the decedent who owned the property when he died and descent cast, and who are clearly entitled to the property but for certain judgments rendered in another Court, which judgments are alleged to be void for want of jurisdiction of the party and the subject matter in the Court in a special proceeding, to render the judgments attacked.

If the party in whose favor the judgment was rendered had no right to sue for the thing claimed, the Court had no jurisdiction to adjudge the thing to the party so suing.

If there was no valid law in force authorizing the Court to render the judgment upon the facts of the case, the Court had no jurisdiction to render judgment. If there was a usurpation of jurisdiction, either as to party

or subject matter, the Court had no right to render judgment. If the Court rendering the judgment had jurisdiction of the parties and of the subject matter for some purposes, if it exceeded its jurisdiction in its judgment, the judgment is void for all matters in excess of its jurisdiction.

When any one of these matters is brought to the attention of another Court collaterally by a suit betwen the same parties, involving the same subject matter, the Court not only has jurisdiction to inquire into the jurisdiction of the Court which gave the judgments complained of and to determine whether they were or were not void, and whether or not they constitute a bar or an estoppel. In this case the appellee did not set them up either as a bar or an estoppel. In their motion to dismiss for want of jurisdiction there is no reference to them. In fact, the Court itself set them up and rendered its decree dismissing the bill without inquiring into their validity.

The uniform decisions of this Court for one hundred years condemn such a proceeding, no matter whether the judgment was rendered by a Court of admiralty, common law, or chancery. The case of the "Betsey," 3 Dall., 5, was decided in 1794. Rose *vs.* Himely, 4 Cranch, 240, was decided in 1808. They both involve questions of international law, as this case does. See the lucid statement of the principle by Chief Justice Marshall in the last case, 4 Cranch., on pages 268, 269, 270. In the next case, Griffith *vs.* Frazier, 8 Cranch., 9, the rule is stated to be that: "The acts of a tribunal

"upon a subject not within its jurisdiction are void." Elliott *vs.* Piersol, 1 Pet., 328. In considering the case of Wilcox *vs.* McConnell, 13 Pet., 496, involving a conflict of the statutes of Illinois with those of the United States, as we say here the statutes of California are in conflict with the Constitution of the United States, we invite the attention of this Court to what the Supreme Court said on page 516. In Shriver *vs.* Lynn, 2 How., 43, there was an excess of jurisdiction in the decree. Hickey *vs.* Stewart, 3 How., 750, a decree of the Chancery Court of Mississippi declared void for want of jurisdiction of the subject matter of real estate. Williamson *vs.* Berry, 8 How., 495, is valuable for the rules stated and authorities cited. Thompson *vs.* Whitman, 18 Wall., 457, is also a valuable case, which decided that a Court of New Jersey had no jurisdiction of the locus..

The foregoing cases show and decide that the Circuit Court did have jurisdiction to inquire into the jurisdiction of the State Court to render the judgments attacked and also into the validity of the State law under which the property of the complainants was taken from them and given to the appellee.

As this is a suit in equity this Court has jurisdiction to determine the whole case on its merits.

The appellee has staked her whole claim and defense on her motions to dismiss or affirm.

We have conclusively shown, in this brief, that the decree appealed from is erroneous. The motion to dismiss makes no attack upon the regularity of the pro-

ceedings taken to perfect the appeal. We have shown in this brief that the judgments of the State Court attacked by the bill are not sufficient to bar or estop appellants.

In our brief in reply to the motion to affirm, we have shown that the appellee is not the lawful heir of Thomas H. Blythe. That neither the Constitution nor Statutes of the State of California, nor any decision of her Courts could endow the appellee with heritable blood, or capacity to inherit, take or hold in fee the real estate of which Thomas H. Blythe died seized.

The appellee admits that appellants are next of kin and heirs at law of the said Thomas H. Blythe, and that they are owners in fee of the real estate described in the bill unless appellee is.

CONCLUSIONS.

1. The motion to dismiss the appeal must be denied.

2. The decree appealed from is erroneous and must be reversed.

3. As the appellee was and is incapable of taking and holding the real estate of which Thomas H. Blythe died seized, as his heir at law by descent, or otherwise, and has not, nor ever had, any right, title, or interest therein or thereto, her motion to affirm the decree below must be denied.

4. As appellants, as next of kin and heirs at law of Thomas H. Blythe, did inherit from him by descent the real estate which he died seized, they are the owners in fee of said real estate.

5. That appellants are entitled to a decree quieting their title to said real estate as against the appellee, and to be let into possession.

6. That appellants are entitled to a final decree in their favor upon the whole case made upon the record, and for costs.

L. D. McKISICK,
Counsel for Appellants.

L. D. McKisick
Counsel for Appellants.

No. 367.

Reply Br. of Holladay, Holladay a

IN THE

Supreme Court of the United States.

Chandler for Appts. (

October Term, 1898.

Filed Feb. 6, 1899.

No. 367.

JOHN W. BLYTHE, and
HENRY T. BLYTHE,
Appellants,

vs.

FLORENCE BLYTHE HINCKLEY,
Appellee.

Appellants' Final Reply Against Motion to Dismiss or Affirm.

Appellee in her reply brief concedes that the real question is, whether or not a State may pass a statute operating in the field of the treaty power in the absence of a treaty covering the subject of the statute,—she affirming that the State may do so; for she says (page 6), "to "this we answered in the first place that the statutes in "question are not void, because in the absence of a treaty "the matter can be regulated by the States."

Appellants say that this question was not presented or passed upon in the State Court. It is here sharply presented for the first time in the history of the government.

Appellee, after stating the point, tries to escape a discussion of it by leading off into immaterial matters.

Appellee lays great stress on that part of the record, quoted in reply brief, page 9, wherein it is said that ap-

pellants contested the right of appellee in the State Court, and claimed for themselves.

The Supreme Court of California holds that where one claims land against another, a denial of the claim and a statement that the defendant owns the land raises no new issue outside of plaintiff's claim. The statement that defendant owns it is, the Courts say, but an affirmative denial that plaintiff owns it, and raises no new or other issue.

Marshall *vs.* Shafter, 32 Cal., 176.
Bruck *vs.* Tucker, 42 Cal., 346.
Morgan *vs.* Tillottson, 73 Cal., 520.

But what difference does this make, if the State Statute relating to non-resident aliens is void because repugnant to the federal constitution?

PROPOSITION II.

On page eleven appellee says that "it makes no differ-" ence whether the alienage question was set up in the " pleadings in the Superior Court or not." We submit that a judgment of a State Court is not res adjudicata on any question not presented to that Court for decision by the pleadings. If Florence did not plead alienage and did not claim the property under Section 671 of the Civil Code of California, as an alien, then she has never presented her claim to any Court in her true capacity. She cannot suppress her true capacity and claim estoppel of others until she has done so.

PROPOSITION III.

Appellee argues, that a Court cannot lose jurisdiction, if at one time the Court appeared to have it. That doctrine is exploded in ex parte Bain, 121 U. S., page 1; also, In re Ayers, 123 U. S., page 486.

In the first case cited the Court permitted the District Attorney to amend an indictment, all the trial Court did thereafter was held to be void.

PROPOSITION IV.

Counsel for appellee say, on page 8 of reply brief, that though a judgment in a criminal case on a void statute is void, yet this doctrine has no application to civil matters, "where the Court had undoubted power to award the "subject of the litigation to one party or the other." The Constitution says, that life, liberty or property shall not be taken without due process of law. Property comes within this protection as much as liberty or life. One can no more be taken on a void statute than the other. Appellants' property, which they inherited on the death of Blythe, cannot be taken from them by Section 671 of the Civil Code of California if void, any more than their liberty can be taken from them on a void statute. This Court will look into civil or criminal proceedings of a State Court or any Court, when such proceedings are offered in evidence; first, to see what the issues were in such proceedings under the pleadings therein, and second, to see if such proceedings were void, or are in conflict with the Constitution of the United States. This was done in In re Ayers, 123 U. S., page 485-507. The proceedings there reviewed collaterally were civil proceedings and were held void.

PROPOSITION V.

We respectfully ask the Court to bear in mind that no proceedings have taken place in the State Court except upon the petition or complaint of Florence. She was ineligible to claim the estate. Any action of the Court taken on her petition or complaint was coram non judice. The State Court got no jurisdiction at the instance of any other claimant. Appellants simply put in issue her claim, nothing more. This being void, the proceedings were void.

The decision in Plaquemines Fruit Co. *vs.* Henderson, 170 U. S., p. 511, though cited by appellee, overthrows the contention of appellee in this case,—namely: that the Circuit Court of the United States has no jurisdiction of a

bill in equity relating to a subject matter that has been previously heard in the State Court, though the prior proceedings in the State Court are in fact and law void.

Appellee contends in this case, that if the State Court has previously passed on the matter involved generally, which matter is the subject of the bill in equity, filed in the federal Court, that fact is the end of controversy, whether the State Court had the same issues before it or not; or whether or not its proceedings were repugnant to the Constitution of the United States; or whether the State Court had or had not jurisdiction. In the case in 170 U. S., the Federal Court held that it had, on a bill in equity, jurisdiction to look through the prior State proceedings, to see if they were void though the State proceedings had been affirmed in the highest Court of the State and a writ of error to the Supreme Court of the United States had been dismissed. In the case at bar, it is contended by appellee, that the Federal Court has no jurisdiction to look into the State proceedings to see if they be void or repugnant to the Constitution of the United States, or were really res adjudicata.

CONCLUSION.

Appellants respectfully say that they are entitled to an oral argument on the question, whether the Court below decided correctly or not. The great bulk of appellee's brief is devoted to this question, and is not confined to the question of jurisdiction at all.

Appellants ought not to be forced to argue the merits of the entire case on a motion to dismiss.

If the California Statute in question is void, because an invasion of the treaty-making power, and because it violates the Federal Constitution, then all of the decrees in question are void; and all of the many legal arguments used by opposing counsel to dignify and support these decrees fall with them.

S. W. HOLLADAY,
E. B. HOLLADAY,
Solicitors for Appellants.

JEFFERSON CHANDLER,
Of Counsel.

No. 367.

IN THE

Supreme Court of the United States.

No. 367

JOHN W. BLYTHE and
HENRY T. BLYTHE,
APPELLANTS,

vs.

FLORENCE BLYTHE HINCKLEY,
APPELLEE.

16,952

NOTICE OF MOTION

BY FLORENCE BLYTHE HINCKLEY TO DISMISS OR AFFIRM THE APPEAL OF JOHN W. BLYTHE AND HENRY T. BLYTHE.

W. H. H. HART,
Solicitor for Florence Blythe Hinckley.

JOHN GARBER,
ROBERT Y. HAYNE,
FREDERIC D. McKENNEY,
Of Counsel.

IN THE

Supreme Court of the United States.

No. 367.

JOHN W. BLYTHE, and
HENRY T. BLYTHE,
Appellants,
vs.
FLORENCE BLYTHE HINCKLEY,
Appellee.
16,952.

To the appellants John W. Blythe and Henry T. Blythe, Messrs. S. W. & E. B. Holladay, Chandler & Holladay and L. D. McKisick, their solicitors and counsel:

Please take notice that, at the courtroom of the Supreme Court of the United States, in the City of Washington, D. C., on Monday, the 6th day of February, 1899, at the opening of the Court on said day, or as soon thereafter as counsel can be heard, the appellee, Florence Blythe Hinckley, will move the Court to dismiss or affirm the appeal heretofore taken in the above entitled cause by the complainants, John W. Blythe and Henry T.

Blythe, from the final decree in said cause made and entered on December 22d, 1897, dismissing the said complainants' bills, and now on the docket of the Court. Said motion will be made upon the following grounds, viz.:

I.

Said decree of the Circuit Court was plainly right, because the judgments of the State Courts mentioned in the amended and supplemental bills are binding and conclusive upon the federal Courts, and cannot be set aside, overridden or disregarded, and because no federal question is involved in said cause.

II.

No constitutional question is involved in said cause or on said appeal, and that this Court has no jurisdiction of said appeal. III.

The said Circuit Court had no jurisdiction of said cause, because said decrees of said State Courts are valid, and said Circuit Court has no power to set them aside, override or disregard them, and because this Court has, in effect, so decided in the case of Blythe *vs.* Ayres, 167 U. S. 746. and that this Court has no jurisdiction of said appeal. IV.

The said decree of the Circuit Court adjudged that the complainants showed no ground of equity jurisdiction, which adjudication cannot be reviewed by this Court on

certificate, and hence all interest of the appellants has ceased, and it would do no good to reverse any part of said decree.

V.

That it is manifest that the appeal was taken for delay only, and that the supposed questions of jurisdiction are all so frivolous and fictitious as not to need further argument.

The grounds of said motion will more fully appear from the accompanying printed motion and brief, to which reference is hereby made.

Said motion will be made upon the transcript of the record, certified by the Clerk of the Circuit Court, in accordance with the *praecipe* of appellants' solicitors and the order of the Court, and caused to be printed by the appellee and on the files of the Court.

W. H. H. HART,

Solicitor for Florence Blythe Hinckley.

JOHN GARBER,

ROBERT Y. HAYNE,

FREDERIC D. McKENNEY,

Of Counsel.

No. 367.

Br. of Hart, Garber, Hayne & McKenney for Appe

IN THE

Supreme Court of the United States.

OCTOBER TERM 1898.

No. 367

Filed Jan. 16, 1899.

JOHN W. BLYTHE and
HENRY T. BLYTHE,
APPELLANTS,

vs.

FLORENCE BLYTHE HINCKLEY,
APPELLEE.

16,952

MOTION AND BRIEF

ON BEHALF OF FLORENCE BLYTHE HINCKLEY TO DISMISS OR AFFIRM THE APPEAL OF JOHN W. BLYTHE AND HENRY T. BLYTHE.

W. H. H. HART,
Solicitor for Florence Blythe Hinckley.

JOHN GARBER,
ROBERT Y. HAYNE,
FREDERIC D. McKENNEY,
Of Counsel.

IN THE

Supreme Court of the United States

No. 367.—October Term, 1898.

JOHN W. BLYTHE, and
HENRY T. BLYTHE,
Appellants,

vs.

FLORENCE BLYTHE HINCKLEY,
Appellee,

16,952.

MOTION.

And now comes the appellee, Florence Blythe Hinckley, pursuant to her written notice of motion, which was served upon the counsel for the appellants as required by the rule of this Court, and which is filed herewith, and moves to dismiss or affirm the appeal heretofore taken by the complainants, John W. Blythe and Henry T. Blythe, from the final decree made and entered by the Circuit Court of the United States for the Ninth Circuit and Northern District of California, on December 22d, 1897, dismissing the several bills of complaint of said

complainants, which motion is made upon the grounds set forth in the following pages:

[THE REFERENCES ARE TO THE TOP PAGES.]

STATEMENT OF THE CASE.

This is a motion to dismiss or affirm an appeal taken by the complainants, John W. Blythe and Henry T. Blythe, from a final decree dismissing their several bills of complaint.

NATURE OF THE SUIT.

The suit was of the kind usually called, in California, a suit to "quiet title" to real property. It was brought under the following provisions of the Code of Civil Procedure:

Statutory provisions.

Sec. 738. "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." * *

Sec. 380. "In an action brought by a person out of possession of real property to determine an adverse claim of an interest or estate therein, the person making such adverse claim and persons in possession may be joined as defendants; and if the judgment be for the plaintiff, he may have a writ for the possession of the premises, as against the defendant in the action, against whom the judgment has passed."

Sec. 739. "If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs."

If the defendant be in possession, he is entitled to a jury trial as a matter of right. Construction of the statutory provisions.

Gillespie *vs.* Gouly, 120 Cal., 515.

The suit is different from a suit to remove a cloud.

Castro *vs.* Barry, 79 Cal., 445-7.

It is not necessary that the defendant's claim should have any semblance of validity, or that the complaint should set forth what the defendant's claim is (*Ib.*, 447).

The complaint is very simple in form. It is sufficient for the plaintiff to aver that he is the owner of the interest in question, that the defendant makes some claim adverse to such interest, and that such claim is invalid as against the plaintiff.

Rough *vs.* Simmons, 65 Cal., 227.

Heeser *vs.* Miller, 77 Cal., 193.

Castro *vs.* Barry, 79 Cal., 447.

Riverside Land Co. *vs.* Jensen, 108 Cal., 147.

The defendant must set forth in his answer whatever claims he relies on.

Landregan *vs.* Peppin, 94 Cal., 467.

THE ORIGINAL COMPLAINT.

Original complaint.

This pleading was in the common form above referred to. After stating the citizenship and residence of the respective parties (viz.: that of the complainants, John W. Blythe and Henry T. Blythe, and that of the defendants, Florence Blythe Hinckley, Frederick W. Hinckley, her husband, and The Blythe Company, a corporation), it

alleged that the complainants were the owners as tenants in common of the real property described therein, and that the defendants, "and each of them, claim that they "have or own adversely to plaintiffs some estate, title or "interest in said lands; but plaintiffs allege that said "claims of defendants are false and groundless and with- "out warrant of law, and their claims to said lands are a "cloud upon plaintiffs' title thereto." The prayer was that the defendants should set forth their claims, and that they be adjudged to be groundless, and for an injunction against further pretensions, and for general relief. (Tr., pp. 1-2.)

THE AMENDED COMPLAINT.

Amended complaint.

The amended complaint repeated the allegations of the original complaint, and in addition thereto alleged that The Blythe Company was a corporation, organized under the laws of California; that the defendants were residents within the Northern District of California; that one of the tracts of land described in the original complaint was of the value "of three millions of dollars and upwards," and that at the commencement of the suit neither one of the parties was in possession. (Tr., pp. 2-4.)

Neither of these complaints contained any suggestion of a federal question.

SECOND AMENDED AND SUPPLEMENTAL BILL.

On January 14th, 1897 (which was more than a year

after the commencement of the suit), the complainants, by leave of Court, filed a "second amended and supplemental bill in equity." (Tr., pp. 5-13.) This document stated, in a general way, the previous pleadings, "*and by* "*way of supplement* to the original and amended bills" averred, by way of anticipation, certain matters in relation to the appellee Florence, and sought to overcome the effect of such matters by averring vague conclusions. We shall endeavor to convey an idea of the scope of this pleading by stating in our own way, and in our own order, what we conceive to be its substance.

Second amended and supplemental bill.

It averred that one Thomas H. Blythe was the owner of the property in his lifetime; that he died in the City and County of San Francisco on April 4th, 1883, being at the time of his death a citizen of the United States and of the State of California, *and a resident of said city and county, and leaving an estate therein* [which we may remark in passing gave the San Francisco Probate Court jurisdiction to administer his estate], and that "after the death "of said Thomas H. Blythe, as hereinbefore alleged, the "public administrator of the City and County of San "Francisco took charge of the estate of said Blythe and "entered upon the administration of the same." [N. B.—This could not have been legally done except upon taking out regular letters of administration from the Probate Court, upon petition and after the usual statutory notice, the same as in the case of all other administrations.] The

Administration on estate of Thomas H. Blythe.

Alleged incapacity of the appellee.

bill further averred certain facts which the pleader evidently supposed went to show that the appellee Florence was incapable of inheriting from said Thomas H. Blythe. In this regard the bill averred that the appellee Florence was born in England, "the bastard child of an unmarried "woman"; that the mother was a British subject; that Florence remained in England until after the death of Thomas H. Blythe, but that after his death, viz.: in 1883, she came to California, being then an infant ten years old and "ineligible to become a citizen of the United States," and that she "was when she arrived in California a non-"resident alien." The bill then proceeds to make averments as to the law of California; and as these averments are the only indication which we see of an attempt to invoke a Federal right, we give them in the pleader's language, to wit:

Attempt to state a federal question.

"That the laws in force in the State of California "in the year 1883, when the said Thomas H. Blythe "died, relating to the rights of foreigners and aliens "to take real estate by succession as heirs at law of "a deceased citizen of the State of California *were the* "*treaty of 1794*, between his Britannic Majesty and "the United States, *and the naturalization laws of the* "*United States* and Section 17 of Article I of the Con-"stitution of California, adopted in the ——— 1879, "which said Section 17 of Article I was made manda-"tory and prohibitory by Section 22 of Article I of "said Constitution. When said Constitution was "adopted, and long prior thereto, there were in the "Civil Code of California certain sections, namely, "Sections 671, 672 and 1404, relating to said subject,

"which last named sections were and are contrary "to and inconsistent with and in violation of said "Section 17 of Article I of said Constitution, and "were by the provisions of said Section 17 and Sec- "tion 22 of Article I annulled and abrogated." (Tr., p. 8.)

Alleged violation of State Constitution and laws.

The bill then referred to certain other provisions of the Civil Code, viz., Sections 230 and 1387, in relation to adoption and the institution of heirship of illegitimate children, and, with reference to the latter, averred that it had been often construed by the Supreme Court of the State, and that such construction had become a rule of property since the year 1854 "until it was attempted to "be changed and abrogated by a decision of said Su- "preme Court made in the year 1894." [Mem.: These several provisions of the Civil Code, and of the Constitution, are given in the note below.]

Provisions referred to in the bill.

Note. Sec. 671. "Any person, *whether citizen or alien*, may take, "hold and dispose of property real of personal within this State."

Sec. 672. "If a non-resident alien takes by succession, he must ap- "pear and claim the property within five years from the time of suc- "cession, or be barred. The property in such case is disposed of as "provided in Title VIII, Part III, Code of Civil Procedure" [relating to escheat proceedings].

Sec. 1404. "Resident aliens may take in all cases by succession as "citizens; and no person capable of succeeding under the provisions of "this title is precluded from such succession by reason of the alienage "of any relative; but no non-resident foreigner can take by succession, "unless he appears and claims such succession within five years after "the death of the decedent to whom he claims succession."

Sec. 17 of Art. 1 (of Constitution). "Foreigners of the white race or "of African descent, eligible to become citizens of the United States un- "der the naturalization laws thereof, while bona fide residents of this "State shall have the same rights in respect to the acquisition, posses- "sion, enjoyment, transmission and inheritance of property as native "born citizens."

Sec. 22 of Art. 1 (of Constitution). "The provisions of this constitu- "tion are mandatory and prohibitory unless by express words they are "declared to be otherwise."

Sec. 230 (of Civil Code). "The father of an illegitimate child, by "publicly acknowledging it as his own, receiving it as such, with the

It was further averred that there was no law in England under which said Thomas H. Blythe could have legitimated the appellee or made her his heir or changed her allegiance or her residence without bringing her to California.

The bill then proceeded to anticipate and attack the muniments of the appellee's title, viz., three decrees of the Superior Court of San Francisco sitting in probate, and to cast epithets at them. As these decrees are important, we proceed to give the averments concerning them separately.

The proceeding to determine heirship.

(1) The first was a decree made upon a direct proceeding in said Superior Court to determine the question of the heirship. In that regard the bill avers—

> "that after the said Florence first came to San Fran-
> "cisco one James Crisp Perry, who was then and
> "there a subject of the Queen of Great Britain, was

"consent of his wife, if he is married, into his family, and otherwise "treating it as if it were a legitimate child, thereby adopts it as such; "and such child is thereupon deemed for all purposes legitimate from "the time of its birth. The foregoing provisions of this chapter do not "apply to such an adoption."

Sec. 1387. "Every illegitimate child is an heir of the person who, in "writing, signed in the presence of a competent witness, acknowledges "himself to be the father of such child; and in all cases is an heir of his "mother; and inherits his or her estate, in whole or in part, as the case "may be, in the same manner as if he had been born in lawful wed-"lock; but he does not represent his father or mother by inheriting "any part of the estate of his or her kindred, either lineal or collateral, "unless before his death, his parents shall have intermarried, and his "father, after such marriage, acknowledges him as his child, or adopts "him into his family; in which case such child and all the legitimate "children are considered brothers and sisters, and on the death of "either of them, intestate, and without issue, the others inherit his es-"tate, and are heirs, as hereinbefore provided, in like manner as if all "the children had been legitimate; saving to the father and mother "respectively their rights in the estates of all of the children in like "manner as if all had been legitimate. The issue of all marriages null "in law are legitimate."

Appellee's pleading in the proceeding to determine heirship.

"appointed by said Superior Court of the City and "County of San Francisco guardian of said Florence, "and thereafter, as such guardian, *he commenced a* "*proceeding* in said Superior Court in the name of "said Florence *to have the Court ascertain, adjudge and* "*determine* the heirship to the said Thomas H. Blythe "and the ownership of his estate, and, in substance, "*that she, said Florence, was the daughter and the sole* "*heir of said Thomas H. Blythe* under and by virtue of "said Sections 230 and 1387 of said Civil Code, or "under and by virtue of one or the other of said sec-"tions, and also by virtue thereof *to have the said* "*Court adjudge and decree that the said Florence was* "*the sole heir at law of the said Thomas H. Blythe and* "*entitled to inherit his estate.*" [Tr., p. 9. Substantially the same averment is in the third amended and supplemental bill. See Tr., p. 31.]

Appellants joinder of issue thereon.

It will thus be seen that the matter of the appellee's right to the property which the complainants seek to litigate here was distinctly pleaded by her in her application to the Superior Court. The bill then proceeds to show that the appellants appeared and joined issue upon the said pleading of the appellee. In this regard the bill alleges—

"that your orators appeared in said action or pro-"ceedings, and filed their answer therein, *denying and* "*contesting the right and title of said Florence and claim-*"*ing for themselves to be heirs of said Blythe.*" [Tr., p. 9. Substantially the same averment is in the third amended and supplemental bill. See Tr., p. 31.]

The bill then proceeds to show that the question of the alleged disability of said Florence by reason of the cir-

cumstances of her birth and of her alienage was actually litigated in said proceeding. In this regard it avers—

The question actually litigated.

> "that thereafter such proceedings were had in said "Court in the said cause that it was for the first time "*made to appear plainly to the Court* upon the record "that said Florence was an illegitimate child; that "she was born in England, and that neither she nor "her alleged mother, nor father of the alleged "mother, had ever been within the United States or "eligible to become citizens thereof until after the "death of the said Thomas H. Blythe." * * * "* * * Your orators further say that in the said "proceeding, wherein the said Florence was peti- "tioner and plaintiff, *it was at the trial thereof at- "tempted to be proven* by her and in her behalf that the "said Thomas H. Blythe, after the birth of the said "Florence, and before his death, and while he was "living in the State of Califronia, and while the said "Florence was living in England, as aforesaid, at- "tempted to legitimate the said Florence by adop- "tion under said Section 230 of the Civil Code, *or to "institute her as his heir* under said Section 1387 of "said Code." [Tr., p. 9. Substantially the same averment is made in the third amended and supplemental bill. See Tr., pp. 31-2.]

The bill then proceeds to show that the Superior Court decreed in favor of the appellee Florence. In that regard it states that—

The decree in favor of the appellee.

> "the said Superior Court * * * *decided in sub- "stance and effect that said Thomas H. Blythe had in his "lifetime adopted and legitimated the said Florence.*" [Tr., p. 9. Substantially the same averment is made in the third amended and supplemental bill. See Tr., p. 32.]

The proceedings on appeal are then stated as follows:

The affirmance by the Supreme Court.

> " that from said judgment your orators appealed to
> " the State Supreme Court, and in that Court the
> " case was argued, and by a divided Court it was
> " * * in substance and effect, decided that the said
> " Thomas H. Blythe had not adopted or legitimated
> " the said Florence under or in conformity with said
> " Section 230 of the Civil Code, *but that he had consti-*
> " *tuted her his heir* under and pursuant to the pro-
> " visions of Section 1387 of said Civil Code." [Tr., p. 10. Substantially the same averment is made in the third amended and supplemental bill. Tr., p. 32.]

This bill shows, therefore, not only that the claim of the said Florence was set forth in her pleading in the Superior Court, but was put in issue by the appellants, and actually litigated, and was by said Court adjudged in her favor upon two distinct grounds; that an appeal was taken to the Supreme Court, and that the decree was affirmed on one of the grounds, which, however, was amply sufficient to sustain the decree.

We have thus far omitted the attacks made by the bill, upon the decree in order to collect them all in one place. They are as follows:

In reference to the trial the bill states that when it was made to appear that the appellee was a non-resident alien and had never been a resident of California until after the death of said Thomas H. Blythe—

> " it was the duty of said Court to dismiss the petition
> "or complaint, or both, of the said Florence, in so far

Attempted impeachment of the decree.

"as the title and descent of the above described real "estate was involved or affected, *for want of jurisdic-* "*tion* in said Court to adjudge or decree that said "Florence was capable of inheriting said real estate "as an heir at law of said Thomas H. Blythe." [Tr., p. 9. Substantially the same statement is made in the third amended and supplemental bill. Tr., p. 31.]

In stating the decision of the Superior Court the bill says that that Court decided the case in favor of the appellee "without jurisdiction so to do" (*ib.*). And in similar phrase it says that the Supreme Court affirmed the judgment "without any jurisdiction so to do." [Tr., p. 10. Substantially the same statements were made in the third amended and supplemental bill. See Tr., p. 32.]

The bill further animadverts upon the decisions as follows:

"And in that behalf your orators say that neither "the said Superior Court nor the said Supreme Court "considered, adjudged or construed, in making its "decision, the said Section 17 of Article I and said "Section 22 of Article I of the Constitution of the "State of California; nor were the rights of your "orators under those sections adjudged or deter- "mined by either of said Courts or by its decision.

"And in that behalf your orators say that said last "decision so made by a divided Court was and is con- "trary to and in violation of *the Constitution of the* "*State of California*, and was and is contrary to and "direct conflict with *numerous former decisions of said* "*Supreme Court*, which former decisions had long be- "fore established a rule of property in said State, "which rule had excluded aliens and foreigners who

"occupied the same or similar status as did said "Florence, from inheriting real estate in the State of "California. Attempted impeachment of the decree.

"And in that behalf your orators further say that "they are informed and believe, and upon their in- "fomation and belief say, that they are not precluded "in the said conflicting decisions of the State Court, "nor by anything contained in the record of the pro- "ceedings upon which said last decision was made, "from prosecuting this their action in this Court, nor "is this Court precluded from entertaining jurisdic- "tion of this action and deciding it upon its merits, "nor is said last decision binding or obligatory as "authority or otherwise upon this Court." [Tr., p. 10. Substantially similar averments are made in the third amended and supplemental bill. Tr., p. 32.]

That is all that the bill has to say in derogation of the decree upon the proceeding to determine the heirship of the several persons laying claim to the estate of Thomas H. Blythe.

(2.) The next muniment of the appellee's title is the decree of partial distribution. The allegations as to the proceeding and the incantations against it are similar to those in relation to the first decree, and we shall give them as they stand. They are as follows: Proceedings on partial distribution.

"And your orators further say that heretofore, "to wit, on June 18, 1894, said Florence, calling her- "self Florence Blythe, filed in said Superior Court, "in the matter of the estate of said Thomas H. Blythe, "deceased, *her petition for distribution*, praying for an

Petition for partial distribution.

"order of said Court distributing to her the share of "said estate to which she claimed to be entitled, "to wit, the whole of said estate, embracing the real "property first above described, *to which she alleged* "*herself to be entitled only as sole heir at law and sole* "*next of kin to said Thomas H. Blythe, deceased.*

"That in her said petition *it was plainly made to* "*appear* to said Court that said Florence, the peti- "tioner, was a non-resident alien, and was not and "never had been a bona fide resident of the State of "California until after the death of said Thomas H. "Blythe and descent cast, and your orators say that "it was the duty of said Court to dismiss the said "petition for distribution of said Florence, in so far "as the title and descent of the above described real "estate was involved or affected, for want of juris- "diction in said Court to adjudge or decree that said "Florence was capable of inheriting said real estate "as heir at law of said Thomas H. Blythe, or to dis- "tribute said real estate to her.

Joinder of issue thereon.

"*That your orators answered said petition* for distri- "bution, *and thereby took issue upon all the material* "*averments thereof*, and therein claimed said estate as "heirs of said Blythe.

"That afterwards the Court, sitting in probate, "without right or jurisdiction so to do, *heard said* "*petition for distribution*, and afterwards, on October "26, 1894, said Court *went through the idle form of* "*granting a decree of distribution*, and on that day a "document *which falsely purported to be a decree of dis-* "*tribution* of *nearly* all the property of said estate of "Thomas H. Blythe *to said Florence*, embracing all of "the real property above described, *was signed by the* "*Judge of said Court and filed by the Clerk*, and on the "next day thereof *was recorded* in the minute book of "said Court. [N. B.—No other entry of such de- "crees is required. Re Blythe, 110 Cal., 226.]

Decree of partial distribution.

"And your orators say that said pretended decree "of distribution was and is null and void for want of "jurisdiction in said Court to make the same." [Tr., pp. 10-11. Substantially similar averments are made in the third amended and supplemental bill. Tr., pp. 32-3.]

Decree of final distribution.

The bill then states that the appellee attained her majority on or about December 18th, 1891, and that on September 21st, 1892, she married the defendant Frederick W. Hinckley.

(3). The third muniment of the appellee's title is the decree of final distribution. The averments in relation to that are as follows:

"And your orators further say that heretofore and "since the filing of the original bill herein, to wit, on "January 2d, 1896, said Florence, calling herself "Florence Blythe Hinckley, *filed in said Superior "Court*, in the matter of the estate of said Thomas H. "Blythe, deceased, *her petition for final distribution to "her* of said estate, wherein and whereby she prayed "for an order of said Court distributing to her the "residue of said estate then remaining in the hands "of the public administrator, amounting to the sum "of $89,842.94, the same and the whole thereof being "the rents accrued from the real property aforesaid, "to which she alleged herself to be entitled only as "the sole heir at law and sole next of kin to said "Thomas H. Blythe, deceased.

The possession of the appellee.

Prayer of the bill

"That in her said petition *it was made "plainly to appear* to said Court that said "Florence, the petitioner, was born and con-"tinued to be a non-resident alien until after

and your orators say that it was the duty of said Court to dismiss said pet.

"the death of said Blythe, and was not and "never had been a bona fide resident of the State of "California until after the death of said Thomas H. "Blythe and descent cast; and your orators say that "tion for final distribution to said Florence, in so far "as the above described real estate and said rents "were involved or affected, *for want of jurisdiction* in "said Court to adjudge or decree that said Florence "was incapable of inheriting said real estate as heir "at law of said Thomas H. Blythe, deceased, or to "distribute said estate to her.

"*That notice of said petition was given to your orators,* "who were notified and invited to come into Court "and show why said petition should not be granted.

Joinder of issue thereon.

"That in obedience and response to said notice "*your orators did, on January 16th, 1896, file in said* "*Court their answer, wherein and whereby they denied* "*the right of said Florence to have said rents distributed* "*to her and claimed that they were the next of kin of said* "*Thomas H. Blythe, deceased,* and entitled to said "rents.

The hearing.

"That afterwards, on the 16th day of January, "1896, said Court, sitting in probate, without right "or jurisdiction so to do, *heard said petition for final* "*distribution* and wrongfully struck from the files the "answer and opposition so theretofore filed by your "orators, and when your orators arose and attempt-"ed to object and to show cause why said petition "should not be granted, said Court refused to permit "your orators to be in anywise heard. [Mem.: It is to be observed that the Court "heard said petition," and that it is not stated what the petition contained; presumably it set forth the previous decrees of the Court; and if so, and the appellants' answer did not deny the prior adjudications, but admitted them, and merely denied in general terms the right of the appellee, it is no wonder that the Court refused to

give such an answer any serious consideration. Re Blythe, 112 Cal., 694; Re Blythe, 115 Cal., 553.]

"And afterwards, on January 18th, 1896, said Court "*went through the idle form* of granting a decree of "final distribution, and on that day a document "which falsely purported to be a decree of final dis- "tribution, distributing to said Florence all the resi- "due of said estate, based upon said petition last "aforesaid, *was signed by the Judge of said Court and* "*filed by the Clerk, and the same was thereafter recorded* "*in the minute book of said Court.* [Mem.: No other recording or entry is provided for decrees of this character. Re Blythe, 110 Cal., 226.]

"And your orators say that said pretended decree "of final distribution was and is null and void for "want of jurisdiction in said Court to make the "same." [Tr., pp. 11-12. Substantially similar averments are made in the third amended and supplemental bill. Tr., pp. 34-5.]

The bill goes on to state that at the commencement of the suit the public administrator was in possession of the property, but that subsequent thereto the appellee obtained possession under the decrees of distribution above referred to, and still is in such possession. It then goes on to show a basis for an accounting as to the rents and profits, and prays for a decree quieting complainants' title, and for an accounting as to the rents and profits, and for general relief, and for a receiver *pendente lite*. [Tr., pp. 12-13. Substantially similar averments are made in the third amended and supplemental bill. Tr., pp. 35-6.]

Boswell M. Blythe.

This bill brought in one Boswell M. Blythe as a defendant, upon the allegation that he was one of the heirs of Thomas H. Blythe, but "that *by reason of his citizenship* he "cannot join your orators as complainants," and that as he resided out of the jurisdiction complainants stated the facts concerning him. [Mem.: See Blacklock *vs.* Small, 127 U. S., 96.] The suit was subsequently dismissed as to this party. (Tr., pp. 15-16.)

No fraud charged.

It will be observed that none of these bills makes the least charge of fraud in the obtaining of either of the three decrees of the Superior Court above mentioned. Nor is any concealment, suppression or want of information charged. On the contrary, it is expressly stated that the illegitimacy, alienage and non-residence of the appellee here at the time of descent cast were "made plainly "to appear" to the Court.

DISMISSAL OF THE SUIT.

Proceedings on the motion to dismiss.

After the filing of the Second Amended and Supplemental Bill, the appellee Florence moved to dismiss the suit for want of jurisdiction. (Tr., p. 14.) This motion was granted, the opinion thereon being set forth in the record. (Tr., pp. 17-28.) The appellants, however, obtained leave to amend their bill. In this regard the certificate states that after the Court ordered the dismissal, it—

"gave the complainants leave to amend their bill Proceedings on motion to dismiss.
"*upon the understanding that it would not necessitate any*
"*further argument, but should be subject to the prior mo-*
"*tion to dismiss the second amended and supplemental*
"*bill and to the order for a final decree entered thereon;*
"that thereafter in due season, on the 22nd day of
"December, 1897, the complainants, pursuant to the
"leave given them by said Circuit Court, filed their
"third amended and supplemental bill against said
"defendant Florence Blythe Hinckley, and there-
"upon an in due season, the said defendant, by her
"solicitor, appeared to said last bill and moved the
"Court to dismiss the suit upon the same grounds
"and for the same reasons stated and contained in
"the motion hereinbefore set out to dismiss the sec-
"ond amended and supplemental bill.

"It was thereupon stipulated and agreed in open
"Court by and between the solicitors for complain-
"ants and said defendant Florence Blythe Hinck-
"ley, with the consent of the Court, that said
"last named motion should be and the same then and
"there was submitted to the Court for its decision
"upon the facts, matters and things stated and al-
"leged in said third amended and supplemental bill
"of complaint, and upon the said motion of said de-
"fendant, Florence Blythe Hinckley, and upon the
"arguments of solicitors and counsel for the re-
"spective parties made by them on the hearing of
"the motion to dismiss the suit and cause of action
"in said second amended and supplemental bill
"stated and alleged." (Tr., p. 49.)

This bill also was dismissed, as will appear from the final decree hereinafter referred to.

THIRD AMENDED AND SUPPLEMENTAL BILL.

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The complainants' third amended and supplemental bill, filed under the circumstances mentioned in the preceding extract, viz., "upon the understanding that it "would not necessitate any further argument, but should "be subject to the prior motion to dismiss the second "amended and supplemental bill, and to the order for a "final decree entered thereon," was the same in substance as its predecessor, except in the following particulars, viz.: It set forth certain reasons to show why an action at law would not be an adequate remedy (See Tr., pp. 37-8); it expressly admitted and averred *that if the appellee Florence could take by descent from Thomas H. Blythe, then she had the true title and the complainants had no case* (Tr., p. 37); and it amplified the invocation of a federal question. Its averments in this latter regard are as follows:

empt to e a fed- l ques- on.

"And your orators further say that said Court, with- "out any jurisdiction so to do, decided in substance "and effect, that said Thomas H. Blythe had in his "lifetime adopted and legitimated the said Florence "by holding and deciding that Sections 230 and 1387 "of the Civil Code of California operated upon said "Florence while an alien and residing in England, "and gave power to said Blythe to adopt her and "make her his heir while said Florence was in Eng- "land and said Blythe was in California, which said "statute did not do; and in that behalf your orators "say that in making said decision the Court *did not* "*take into consideration Section 1978 of the Revised*

Attempt state & federal question.

" *Statutes of the United States*, nor were the rights " of your orators or of said Florence under that sec- ' tion, or at all, adjudged or determined." (Tr., p. 32.)

" * * * And your orators say that said pre- " tended decree of distribution was and is null and " void for the want of jurisdiction in said Court to " make the same, for the following reasons, among " others: Section 671 of the Civil Code of California, " reading as follows, 'Every person, whether citizen " 'or alien, may take, hold, and dispose of property, " 'real or personal, within this State,' *was and is void* " *as to aliens*, and Section 672 of said Civil Code, " which reads as follows, 'If a non-resident alien take " 'by succession, he must appear and claim the prop- " 'erty within five years from the time of succession, " 'or be barred,' under which alone she claims title, " *is also void as to aliens*, and especially as to said " Florence.

" Your orators allege that *said sections and each of* " *them is an encroachment upon and an erasion and viola-* " *tion of and a substitution for the treaty making power of* " *the United States*, and, if enforced, *operate as treaty* " *provisions between the State of California and all* " *foreign governments*, and were and each of them is " void and in conflict with and forbidden *by Section* " *10, Article I, of the Constitution of the United* " *States*, and with the treaty making power thereof, " and in violation of and in conflict with Section 1978 " of the Revised Statutes of the United States, and " both of them are and each of them is in excess of " the jurisdiction of the State of California to enact, " and of the Courts of California to enforce; that said " judgment or decree awarding said real property to " said Florence on her petition alone, as was done, " has no other legal support or justification than said " sections of the Code of California, which are void, " *so far as they apply to aliens*, and particularly to said

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" Florence, for the reasons that they violate the Con-
" stitution and laws and treaties of the United
" States, and because California and her Courts *have*
" *no jurisdiction to enact or enforce said statutes, or either*
" *of them, as to aliens,* and said statutes violate and
" each of them violates and is forbidden by the Con-
" stitution of the United States, the treaty making
" power and existing treaties of the United States,
" and said judgment or decree in execution of said
" statutes is void. Your orators allege that none of
" the constitutional or other objections aforesaid to
" the jurisdiction of said Court or the validity of said
" statutes, as applicable to said Florence, were de-
" cided or considered by the Court upon the hearing
" of said petition for distribution; that the judgment
" of said Superior Court awarding said property to
" said Florence was further without jurisdiction, for
" said Court held, adjudged and decreed that said
" Blythe's alleged action under Section 1387 of the
" Civil Code of California, reading as follows, 'Every
" 'illegitimate child is an heir of the person who in
" writing, signed in the presence of a competent wit-
" 'ness, acknowledges himself to be the father of such
" 'child,' operates and did operate upon said Florence
" in England and outside of and beyond the geograph-
" ical jurisdiction and the boundaries of the State
" of California, and said Court adjudged and held
" that said statute and said action *operated to change*
" *and fix the social, political and legal status of said*
" *Florence while an illegitimate alien,* as she then and
" there was residing in England at the time of de-
" scent cast and always prior thereto.

" Your orators say that Section 1387 does not in
" terms operate beyond the geographical boundaries
" of the State of California, and it had no
" operation or effect at any time in the
" Kingdom of Great Britain, nor did any al-

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"leged action under it; and it had no opera-
'tion upon said Florence or her right to said real
"property at the time of descent cast or prior thereto,
"nor did said judgment so operate; that said sec-
"tion (Sec. 1387), as construed by the Court, was and
"is *against Article 1, Section X, of the Federal Constitu-*
"*tion and an invasion of the jurisdiction of international*
"*intercourse between the United States Government and*
"*the Government of England,* which jurisdiction is ex-
"clusively with the United States, and was and is un-
"constitutional and void because thereof, and be-
"cause of a lack of power and jurisdiction in Cali-
"fornia or its Courts to give said statute the opera-
"tion which it was adjudged by said Court to have,
"and invades the treaty making power of the United
"States, and said section is in violation of Section
"1978 of the Revised Statutes of the United States
"and of the rights of complainant (pp. 33-4). * * *
* * * "And your orators say that Sections 671,
"672, and 1387 of the Civil Code of California,
"through which and not otherwise, said Florence
"claims title to said real property and said rents, are
"and each of them is *in conflict with existing treaties*
"between the United States of America *and Russia*
"*and Switzerland and France* and England, and
"against the Constitution of the United States in the
"particulars hereinbefore mentioned, as well as the
"fourteenth amendment thereto, which limits the
"jurisdiction of the State to its own citizens.

"The complainants claim that they had the right,
"as citizens of the United States, to inherit the real
"property here involved under the laws of California
"and under Article IV, Section 2, of the Constituti-
"tion of the United States, and under Section 1978
"of the Revised Statutes of the United States, and
"that said Florence has and had no right thereto,

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" because at the time of the death of Thomas H.
" Blythe and descent cast she was an illegitimate
" alien and a British subject and was and always had
" been in England, and that in determining the ques-
" tions of the rights of the parties herein the con-
" struction and application of the Constitution of the
" United States are involved, and therefore your ora-
" tors allege and claim that this Court has jurisdic-
" tion thereof, on the ground that the construction
" and application of the Federal Constitution are in-
" volved, as well as on the ground of diverse citizen-
" ship of the parties, and because said sections of said
" Civil Code violate the Federal Constitution, as
" herein stated."

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The appellants asked to be allowed to file a further amendment, contradicting what was manifestly the effect of the decrees stated in the second and third amended and supplemental bills. The Circuit Court refused to allow such amendment to be made, and the complainants thereupon obtained a "bill of exceptions" to such refusal. (Tr., p. 39.)

We do not understand that the bill superseded the prior bills.

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1 Danl. Ch. Pr. (Perkins' Ed.), p. 402-3.

French *vs.* Hay, 22 Wall., 246.

Keyser *vs.* Renner, 87 Va., 251.

Excelsior Co. *vs.* Brown, 74 Fed., 323-4.

Walsh *vs.* Smyth, 3 Bland Ch., 20.

Catton *vs.* Carlisle, 5 Mass., 427.

Jopling *vs.* Stuart, 4 Ves., 619.

Bacon *vs.* Griffith, 4 Ves., 619-20.
Winter *vs.* Quarles, 43 Ala., 695.
Carey *vs.* Smith, 11 Ga., 547.
Wilson *vs.* Beadle, 2 Head, 512.
Bradley *vs.* Dibble, 3 Heisk., 524.
Taunton *vs.* McInnish, 46 Ala., 622.
Mezeix *vs.* McGraw, 44 Miss., 111.
Hammond *vs.* Place, Harr (Mich.), 438.

But there is little difference between the last two bills.

THE FINAL DECREE.

Grounds of dismissal.

The final decree, entered December 22d, 1897, finally dismissed the various bills of complainants "for want *of* "*either Federal or equity* jurisdiction." (Tr., pp. 40-1.)

THE APPEAL AND CERTIFICATE.

Petition for appeal.

The complainants' petition for an order allowing an peal stated as the proposed grounds of appeal the alleged error of the Court "in holding and deciding, as it did do, "that it had no jurisdiction of complainants' suit on any "ground set up by complainants, and that no federal "question was involved therein," and because—

"the construction and application of the Constitu-
"tion of the United States was involved in the mat-

"ters, allegations and averments of complainants, "though this Court erred in deciding otherwise, and "that they were not involved; and your petitioners "state that they are entitled to an appeal on the fur- "ther ground that this Court erred in deciding on "said motion, as it did, that Sections 671, 672, and "Sections 230 and 1387 of the Civil Code of Califor- "nia, in their construction and application to this "suit, did not contravene the Constitution of the "United States, as stated in the assignment of errors "filed herewith." (Tr., pp. 41-2.)

Assignments of error.

The complainants filed twenty-three assignments of error, for which we beg leave to refer to the record. (Tr., fols. 43-6.)

Order allowing appeal.

The order allowing the appeal was general. (Tr., pp. 46-7.) Although the opinion of the Circuit Court (See Tr., pp. 17-28) shows only two grounds upon which the suit was dismissed, the appellants have so phrased the certificate as to state fifteen grounds (Tr., pp. 50-3), some of which were of considerable length.

The foregoing is probably a sufficient statement of the case. But it will perhaps be of assistance to the Court, in the examination of the motions, if we give, as part of the statement of the case, the statutory and constitutional provisions, which may require its attention, together with the settled construction thereof, avoiding as much as possible controverted questions. This we now proceed to do.

JURISDICTION OF THE SUPERIOR COURT.

The State Constitution provides (with certain exceptions not material here), that "there shall be in each of "the organized counties of the State a Superior Court, "for each of which at least one Judge shall be elected." (Art. VI, Sec. 6.) It expressly provides that such Courts "shall be Courts of Record," (Art. VI, Sec. 12), and defines their jurisdiction as follows:

The State Constitution.

Sec. 5 (Art. VI). "The Superior Court shall have "original jurisdiction *in all cases in equity*, and *in all* "*cases at law which involve* the title or possession of "real property, or the legality of any tax, impost, "assessment, toll, or municipal fine, and in all other "cases in which the demand, exclusive of interest or "the value of the property in controversy, amounts "to three hundred dollars, and *in all criminal cases* "amounting to felony, and cases of misdemeanor not "otherwise provided for; of actions of forcible entry "and detainer; of proceedings in insolvency; of "actions to prevent or abate a nuisance; *of all matters* "*of probate;* of divorce and for annulment of mar- "riage, and of all such special cases and proceedings "as are not otherwise provided for. And said Court "shall have the power of naturalization, and to issue "papers therefor. They shall have appellate juris- "diction in such cases arising in Justices' and other "inferior Court in their respective counties as may "be prescribed by law. They shall be always open "(legal holidays and non-judicial days excepted), "and their process shall extend to all parts of the "State; *provided*, that all actions for the recovery of "the possession of, quieting the title to, or for the en- "forcement of liens upon real estate, shall be com-

"menced in the county in which the real estate, or "any part thereof affected by such action or actions "is situated. Said Courts, and their Judges, shall "have power to issue writs of mandamus, certiorari, "prohibition, quo warranto, and habeas corpus, on "petition by or on behalf of any person in actual "custody in their respective counties. Injunctions "and writs of prohibition may be issued and served "on legal holidays and non-judicial days."

Superior Court sitting in probate is a Court of general jurisdiction.

Under these provisions, it is settled (contrary to the view which was at first taken) that the Court, sitting in probate, is a Court of general jurisdiction, with ample equity powers in probate matters.

Heydenfeldt *vs.* Superior Court, 117 Cal., 348.

Ions *vs.* Harbison, 112 Cal., 268.

Burris *vs.* Kennedy, 108 Cal., 331.

Estate of Moore, 96 Cal., 528.

In re Burton, 93 Cal., 459.

The same was true (since 1858) of the Probate Courts prior to the Constitution, although the latter were of more limited powers.

Robinson *vs.* Fair, 128 U. S., 153.

Estate of Twombley, 120 Cal., 350.

Irwin *vs.* Scriber, 18 Cal., 499.

Halleck *vs.* Moss, 22 Cal., 275-6.

The question as to which of the Superior Courts of the State is to take jurisdiction of an estate is regulated by the following provision of the Code of Civil Procedure:

Provision of the Code.

Sec. 1294. "Wills must be proved, and letters "testamentary or of administration granted:

"1. In the county *of which the decedent was a resi-* "*dent at the time of his death*, in whatever place he "may have died;

"2. In the county in which the decedent may "have died, leaving estate therein, he not being a "resident of the State;

"3. In the county in which any part of the estate "may be, the decedent having died out of the State, "and not resident thereof at the time of his death;

"4. In the county in which any part of the estate "may be, the decedent not being a resident of the "State, and not leaving estate in the county in which "he died.;

"5. In all other cases, in the county where ap- "plication for letters is first made."

The decision of the Court as to the existence of the jurisdictional fact of residence cannot be attacked collaterally.

Re Griffith, 84 Cal., 110.

[Mem.: There is no dispute as to the existence of the above jurisdictional facts here. The complainants themselves aver them. The bill expressly states *that Thomas H. Blythe was, at the time of his death, a resident of the City and County of San Francisco*, and that he left estate therein. Tr., pp. 6-7.]

SCOPE AND EFFECT OF PROBATE PROCEEDINGS.

Probate proceedings of the kind provided for in California have been held to be in the nature of proceedings *in rem*.

The William Hill Co. *vs.* Lawlor, 116 Cal., 359.
Kearney *vs.* Kearney, 72 Cal., 393.
State *vs.* McGlynn, 20 Cal., 269.
Broderick Will Case, 21 Wall., 509.
Grignon's Lessee *vs.* Astor, 2 How., 338.
Tompkins *vs.* Tompkins, 1 Story, 547.

In our State real and personal property are on substantially the same basis, so far as administration of the estates of decedents is concerned; and there is very little difference in the administration or proceedings between cases where there is a will and cases where there is none. In the case of a will, the document must be filed, with a petition for its admission to probate, and thereupon a day is fixed for the hearing, and it is made the duty of the Clery to give notice of such hearing by publication and by mail in the manner specified in the Code. If there be no will, the proceedings are instituted by the filing of a petition for letters of administration. The provisions of the Code of Civil Procedure in this latter regard are as follows:

Sec. 1371. "Petitions for letters of administra-
"tion must be in writing, signed by the applicant or

" his counsel, and filed with the Clerk of the Court, " stating the facts essential to give the Court juris- " diction of the case, and when known to the appli- " cant, he must state the names, ages, and residences " of the heirs of the decedent, and the value and " character of the property. If the jurisdictional " facts existed, but are not fully set forth in the peti- " tion, and are afterward proved in the course of ad- " ministration, the decree or order of administration " and subsequent proceedings are not void on ac- " count of such want of jurisdictional averments." Provisions where there is will.

Sec. 1373. "When a petition praying for letters " of administration is filed, *the Clerk must give notice* " *thereof* by causing notices to be posted in at least " three public places in the county, one of which must " be at the place where the Court is held, containing " the name of the decedent, the name of the appli- " cant, and the time at which the application will be " heard. Such notice must be given at least ten days " before the hearing."

(Compare Re Griffith, 84 Cal., 109.)

Sec. 1374. " Any person interested may contest " the petition by filing written opposition thereto, on " the ground of the incompetency of the applicant, or " may assert his own rights to the administration, " and pray that letters be issued to himself. In the " latter case the contestant must file a petition and " give the notice required for an original petition, " and the Court must hear the two petitions to- " gether."

Sec. 1375. " On the hearing, it being first proved " that notice has been given as herein required, the "Court must hear the allegations and proofs of the " parties ,and order the issuing of letters of adminis- " tration to the party best entitled thereto."

Sec. 1378. " Before letters of administration are " granted on the estate of any person who is repre-

"sented to have died intestate, the fact of his dying "intestate must be proved by the testimony of the "applicant or others, and the Court may also ex- "amine any other person concerning the time, place "and manner of his death, the place of his residence "at the time, the value and character of his prop- "erty, and whether or not the decedent left any will, "and may compel any person to attend as a witness "for that purpose."

Conclusiveness of probate decree.

The decree appointing an administrator is not only conclusive as against a collateral attack,

Irwin *vs.* Schreiber, 18 Cal., 499.
Re Griffith, 84 Cal., 110.

but is an adjudication which is binding by way of estoppel as to every matter involved in it, as, for example, the right to inherit, when involved in the right to administer.

Garwood *vs.* Garwood, 29 Cal., 515.
Estate of Pico, 56 Cal., 411.
Howell *vs.* Budd, 91 Cal., 349.

After the executor or administrator is appointed, it is his duty to take possession of all the assets of the deceased, cause to be made an inventory and appraisement thereof, and must administer the same under the direction of the Court, and account to it for his actions, until the purposes of the administration have been accomplished.

Speaking generally, the purposes of administration are

Mode of dealing with claims of creditors.

the preservation of the property and the application of the same to the payment of the creditors, so far as may be required, and the distribution of the remainder, if any, to those entitled either by a will or the laws as to succession. It is not material to consider the case of creditors. It may be remarked in passing, however, that all creditors, even those whose claims are contingent, are required to present sworn claims to the executor or administrator within ten months after the first publication of notice to creditors, if the estate exceed ten thousand dollars in value, and within four months if of less value.. If the claim be allowed by the executor or administrator, it must then be presented to the Judge, and if it receives his approval it is filed in the Court, and is "ranked among "the acknowledged debts of the estate, to be paid in due course of administration." Even claims involved in pending suits must be presented (C. C. P., Sec. 1502). So must judgments entered against the deceased in his lifetime, and no execution can issue upon such judgments except on judgments "for the recovery of real or personal prop- "erty or the enforcement of a lien thereon." (C. C. P., Secs. 1505 and 686.) If a claim be not presented within the required time, it "is barred forever." (C. C. P., Sec. 1493.) If either the executor or administrator reject a claim, the claimant must bring suit thereon "within three "months after the date of its rejection, if it be then due, "or within two months after it becomes due, otherwise "the claim shall be forever barred." (C. C. P., Sec. 1498.)

A money judgment against an executor or administrator in any such suit, "only establishes the claim in the same "manner as if it had been allowed by the executor or ad- "ministrator and a judge; and the judgment must be that "the executor or administrator pay in due course of ad- "ministration the amount ascertained to be due." No execution can issue on such judgment, nor does it create any lien on any property of the estate, or give any priority (C. C. P., Sec. 1504.)

Property in gremio legis.

In short, the property of the decedent is *in gremio legis.* The Court may, in proper cases, order its sale, and may marshal the assets, and has full equity powers for the purposes of the probate administration. And it may accord a jury trial to the parties entitled thereto. In all its proceedings, whether for the purpose of satisfying creditors or of distribution to heirs, the rules of practice in ordinary cases apply, as far as applicable, to probate proceedings (C. C. P., Sec. 1713), and this includes the practice as to new trials and appeals. (C. C. P., Sec. 1714.)

When the claims of creditors are all satisfied, what remains of the property is distributed to the persons entitled by will or succession. Three methods are provided for the adjudication of the rights of such persons. And as the amended and supplemental bills show an instance of the application of each of these three methods, it will perhaps be well to explain them in detail.

THE PROCEEDING TO DETERMINE HEIRSHIP.

The first method may be resorted to before the estate is ready for distribution, and is in effect a mode of settling the question in advance. The provision of the Code of Civil Procedure in regard to this method is as follows:

Code provision to determine heirship.

Sec. 1664. "In all estates now being administered, or that may hereafter be administered, any "person claiming to be heir to the deceased or entitled to distribution in whole or in any part of such "estate, may, at any time after the expiration of one "year from the issuing of letters testamentary or of "administration upon such estate, *file a petition* in the "matter of such estate, praying the Court to ascertain and declare the rights of all persons to said "estate and all interests therein, and to whom distribution thereof should be made. Upon the filing "of such petition, *the Court shall make an order directing service of notice* to all persons interested in said "estate to appear and show cause, on a day to be "therein named, not less than sixty days nor over "four months from the date of the making of such "order, in which notice shall be set forth the name of "the deceased, the name of the executor or administrator of said estate, the names of all persons who "may have appeared claiming any interest in said "estate in the course of the administration of the "same, up to the time of the making of said order, "and such other persons as the Court may direct, "and also a description of the real estate whereof said "deceased died seized or possessed, so far as known, "described with certainty to a common intent; and "requiring all said persons, and all persons, "named or not named, having or claiming "any interest in the estate of said deceased,

Code provision to determine heirship.

"at the time and place in said order specified, to appear and exhibit, as hereinafter provided, their respective claims of heirship, ownership, or interest in said estate, to said Court, *which notice shall be served in the same manner as a summons in a civil action;* upon proof of which service, by affidavit or otherwise, to the satisfaction of the Court, *the Court shall thereupon acquire jurisdiction to ascertain and determine the heirship, ownership, and interest of all parties* in and to the property of said deceased, *and such determination shall be final and conclusive in the administration of said estate* and the title and ownership of said property. The Court shall enter an order or decree establishing proof of the service of such notice. All persons appearing within the time limited, as aforesaid, shall file their written appearance in person or through their authorized attorney, such attorney filing at the same time written evidence of his authority to so appear, entry of which apearance shall be made in the minutes of the Court and in the register of proceedings of said estate. And the Court shall, after the expiration of the time limited for appearing as aforesaid, enter an order adjudging the default of all persons for not appearing as aforesaid, who shall not have appeared as aforesaid. At any time within twenty days after the date of the order or decree of the Court establishing proof of the service of such notice, any of such persons so appearing may file his complaint in the matter of the estate, setting forth the facts constituting his claim of heirship, ownership, or interest in said estate, with such reasonable particularity as the Court may require, and serve a copy of the same upon each of the parties or attorneys who shall have entered their written appearance as aforesaid, if such parties or such attorneys reside within the county; and in case any of

Code provision to determine heirship

" them do not reside within the county, then service of " such copy of said complaint shall be made upon the " Clerk of said Court for them, and the Clerk shall " forthwith mail the same to the address of such party " or attorney as may have left with said Clerk his " postoffice address. Such parties are allowed " twenty days after the service of the complaint, as " aforesaid, within which to plead thereto, and " thereafter *such proceedings shall be had upon such com-* " *plaint as in this code provided in case of an ordinary* " *civil action;* and the issues of law and of fact arising " in the proceeding shall be disposed of in like manner " as issues of law and fact are herein provided to be " disposed of in civil actions, *with a like right to a* " *motion for a new trial and appeal to the Supreme* " *Court;* and the provisions in this Code contained " regulating the mode of procedure for the trial of " civil actions, the motion for a new trial of civil " actions, statements on motion for a new trial, bills " of exception and statements on appeal, as also in " regard to undertakings on appeal, and the mode of " taking and perfecting appeals, and the time within " which such appeals shall be taken, shall be appli- " cable thereto; provided, however, that all appeals " herein must be taken within sixty days from the " date of the entry of the judgment or the order com- " plained of. The party filing the petition as afore- " said, if he file a complaint, and if not, the party first " filing such complaint, shall, in all subsequent pro- " ceedings, be treated as the plaintiff therein, and all " other parties so appearing shall be treated as the " defendants in said proceedings, and all such de- " fendants shall set forth in their respective answers " the facts constituting their claim of heirship, " ownership, or interest in said estate, with such par- " ticularity as the Court may require, and serve a " copy thereof on the plaintiff. Evidence in support

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" of all issues may be taken orally or by depositions, " in the same manner as provided in civil actions. " Notice of the taking of such depositions shall be " served only upon the parties or the attorneys of the " parties so appearing in said proceeding. The " Court shall enter a default of all persons failing to " appear, or plead, or prosecute, or defend their " rights, as aforesaid; and upon the trial of the " issues arising upon the pleadings in such proceed- " ings, *the Court shall determine the heirship to said de-* " *ceased, the ownership of his estate, and the interest of* " *each respective claimant thereto or therein, and persons* " *entitled to distribution thereof, and the final determina-* " *tion of the Court thereupon shall be final and conclusive* " *in the distribution of said estate, and in regard to the* " *title to all the property of the estate of said deceased.* " The cost of the proceedings under this section shall " be apportioned in the discretion of the Court. In " any proceeding under this section, the Court may " appoint an attorney for any minor mentioned in " said proceedings not having a guardian. Nothing " in this section contained shall be construed to ex- " clude the right, upon final distribution, of any " estate to contest the question of heirship, title, or " interest in the estate so distributed, where the " same shall not have been determined under the " provisions of this section; where such questions " shall have been litigated under the provisions of " this section, *the determination thereof as herein pro-* " *vided, shall be conclusive in the distribution of said* " *estate.*"

See, as to the effect of this section.

Estate of Oxarart, 78 Cal., 109.

The averments of the complainants' pleadings in relation to the proceedings in the estate of Thomas H. Blythe,

Decision of the Supreme Court.

under the provision just quoted have already been referred to (pp. 8-11 hereof). The first appeal to the Supreme Court from the decree of the Superior Court mentioned in complainants' pleadings was taken by a set of claimants known as the "Williams heirs." Counsel for the other claimants (including the claimants here) were heard as *amici curiae*. The result of the appeal was the affirmance of the decree of the Probate Court, upon the ground that the deceased had instituted the appellee Florence his heir.

Blythe *vs.* Ayres, 96 Cal., 532.

The matter was again brought before the Court upon the appeal of The Blythe Company, (the cross-complainant in the case at bar), and the appeal of the complainants in the case at bar. The Court approved and followed its previous decision, but in addition to the grounds there adjudged, held that the several appellants had no standing, because they had not attacked the finding that they or their assignors were not of kin to the deceased, but were mere strangers, and hence it made no difference to them whether the appellee here was entitled or not.

Blythe *vs.* Ayres, 102 Cal., 254.

This decision was approved upon a subsequent appeal, by an alleged wife of the deceased, from the same decree.

Hinckley *vs.* Ayres, 105 Cal., 358.

Blythe *vs.* Ayres, 102 Cal., 262.

The matter again came before the Supreme Court upon an application of the complainants here to dismiss the proceeding to determine the heirship. In this also the complainants met defeat.

Re Blythe, 110 Cal., 226.

THE DECREE OF PARTIAL DISTRIBUTION.

The second method in which the question of the appellee's right as to inherit the property of Thomas H. Blythe, deceased, was adjudicated was the decree of partial distribution of the Probate Court.

The question of a claimant's right to inherit may be litigated and determined on an application for partial distribution.

Re Jessup, 81 Cal., 408.

There are two sets of statutory provisions for partial distribution, which to some extent overlap each other. This condition of affairs came about from legislative carelessness in making amendments to the Code. But this feature is not material in this connection. The two sets of provisions are as follows:

Sec. 1658. "At any time after the lapse of four "months from the issuing of letters testamentary or "of administration, any heir, devisee, or legatee may "present his petition to the Court for the legacy or "share of the estate to which he is entitled, to be

"given to him upon his giving bonds, with security "for the payment of his proportion of the debts of "the estate."

Code provisions partial distribution

Sec. 1659. "Notice of the application must be "given to the executor or administrator, personally, "and to all persons interested in the estate, in the "same manner that notice is required to be given of "the settlement of the account of an executor or ad-"ministrator."

Sec. 1661. "If at the hearing, it appears that the "estate is but little indebted, and that the share of "the party applying may be allowed to him without "loss to the creditors of the estate, the Court must "make an order in conformity with the prayer of the "applicant, requiring:

"1. Each heir, legatee, or devisee, obtaining such "order, before receiving his share, or any portion "thereof, to execute and deliver to the executor or "administrator a bond, in such sum as shall be desig-"nated by the Court, or a Judge thereof, with sure-"ties to be approved by the Judge, payable to the "executor or administrator, and conditioned for the "payment, whenever required, of his proportion of "the debts due from the estate, not exceeding the "value or amount of the legacy or portion of the "estate to which he is entitled.

"2. The executor or administrator to deliver to "the heir, legatee, or devisee, the whole portion of "the estate to which he may be entitled, or only a "part thereof, designating it. If, in the execution of "the order, a partition is necessary between two or "more of the parties interested, it must be made in "the manner hereinafter prescribed. The costs of "these proceedings shall be paid by the applicant, "or if there be more than one, shall be apportioned "equally amongst them."

Sec. 1663. "At any time after the lapse of one

Code provisions for partial distribution.

"year from the issuance of letters testamentary, or "of administration, any heir, devisee, or legatee may "present his or her petition to the Court for the dis- "tribution of the net proceeds of the share of the "said estate to which he or she will be entitled. "*Notice of the application must be given*, as required by "Section sixteen hundred and fifty-nine. *The executor* "*or administrator, or any other person interested in the* "*estate, may appear at the time named and resist the* "*application*, or any other heir, devisee, or legatee "may make a similar application for himself. If at "the hearing it appears that the estate is but little "indebted, and that the share of the party applying "may be allowed to him without loss to the creditors "of the estate, the Court must make an order in con- "formity with the prayer of the applicant, requiring:

"1. Each heir, legatee, or devisee, obtaining such "order, before receiving his share, or any portion "thereof, to execute and deliver to the executor or "administrator a bond, in such sum as shall be desig- "nated by the Court, or a Judge thereof, with sure- "ties to be approved by the Judge, payable to the "executor or administrator, and conditioned for the "payment, whenever required, of his proportion of "the debts due from the estate, not exceeding the "amount or portion of the proceeds of the estate "which he has received; provided, that where the "time for filing or presenting claims has expired, and "all claims that have been allowed have been paid, "or are secured by mortgage upon real estate suffi- "cient to pay them, and the Court is satisfied that "no injury can result to the estate, the Court may "dispense with the bond.

"2. The executor or administrator to deliver to "the heir, legatee, or devisee the proceeds of the "estate to which he may be entitled, or only a part "thereof, designating it. If in the opinion of the "Court, it be necessary, in order to ascertain the pro-

"ceeds that any or all of the heirs, legatees, or devi-
"sees may be entitled, that the interest of any heir,
"legatee, or devisee in one or more pieces or parcls
"of property of the estate shall be determined or
"ascertained, the Court may suspend proceedings
"and direct the petitioner or petitioners to take pro-
"ceedings under Section sixteen hundred and sixty-
"four of this Code to ascertain the interest the peti-
"tioner or petitioners will have under the will in any
"piece or parcel of property. The order must de-
"scribe the property in relation to which proceedings
"are to be taken. Whenever any bond has been
"executed and delivered, proceedings upon any such
"bond may be taken under Section sixteen hundred
"and sixty-two. The cost of these proceedings shall
"be paid by the applicant, or if there be more than
"one, shall be apportioned equally between them."

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The averment of the complainants' pleadings in relation to the proceedings on partial distribution have been already referred to (pp. 13-14 hereof).

A decree of partial distribution is appealable.

Estate of Mitchell, 121 Cal., 393.

And the appeal must be taken within sixty days.

C. C. P., Sec. 1715.

The pleadings do not show whether or not the complainants here took an appeal from this decree. But the decision on the appeal which they in fact took is shown at page 227 of volume 110 of the California Reports. And the records of this Court will show that the complainants here sued out a writ of error to this Court,

and that such writ was by this Court dismissed "for want "of jurisdiction."

Blythe *vs.* Hinckley, 167 U. S., 746.

The Blythe Company (the cross-complainant herein) took an appeal from the decree of partial distribution. But, while expressing satisfaction with its previous decisions, the Court held that as The Blythe Company itself had no right, it could not question the decree awarding the property to the appellee here.

Re Blythe, 112 Cal., 689.

THE DECREE OF FINAL DISTRIBUTION.

The question of the right to inherit may be litigated and determined on an application for final distribution.

Re Oxarart, 78 Cal., 109.

The provisions of the Code of Civil Procedure in relation to the matter are as follows:

Sec. 1665. "Upon the final settlement of the ac- "counts of the executor or administrator, or at any "subsequent time, upon the application of the ex- "ecutor or administrator, or of any heir, legatee or "devisee, the Court must proceed to distribute the "residue of the estate in the hands of the executor "or administrator, if any, among the persons who "by law are entitled thereto; and if the decedent has "left a surviving child, and the issue of other child- "ren, and any of them, before the close of the admin- "istration, have died while under age and not having

Code provisions for final distribution.

"been married, no administration on such deceased "child's estate is necessary, but all the estate which "such deceased child was entitled to by inheritance "must, without administration, be distributed to the "other heirs-at-law. A statement of any receipts "and disbursements of the executor or ad- "ministrator, since the rendition of his final "accounts, must be reported and filed at the time of "making such distribution; and a settlement thereof, "together with an estimate of the expense of closing "the estate, must be made by the Court, and included "in the order or decree; or the Court or Judge may "order notice of the settlement of such supplemen- "tary account, and refer the same as in other cases "of the settlement of accounts."

Sec. 1666. "In the order or decree, the Court must "name the persons and the proportions or parts to "which each shall be entitled, and such persons may "demand, sue for, and recover their respective shares "from the executor or administrator, or any person "having the same in possession. *Such order or de-* "*cree is conclusive as to the rights of heirs, legatees or* "*devisees*, subject only to be reversed, set aside or "modified on appeal."

Sec. 1668. "The order or decree may be made on "the petition of the executor or administrator, or of "any person interested in the estate. *Notice of the* "*application must be given by posting or publication as* "*the Court may direct, and for such time as may be or-* "*dered.* If partition be applied for as provided in "this chapter, the decree of distribution shall not "divest the Court of jurisdiction to order partition, "unless the estate is finally closed."

The decree of final distribution is expressly made conclusive by Section 1666 above quoted. And the decisions are explicit upon this question.

Thus a decree of distribution to trustees is a conclusive adjudication of the validity of the trust, as not being within the rule against perpetuities, and the question cannot be raised by a bill in equity.

Crew *vs.* Pratt, 119 Cal., 139.

So the decree of distribution is conclusive as to the construction of the will, even though the decree was made while the bill in equity was pending.

Goad *vs.* Montgomery, 119 Cal., 552.

After a decree of distribution has become final, either with or without an appeal, the only question is as to the construction of the decree. In a suit to quiet title, the party cannot go back to the will.

Jewell *vs.* Pierce, 120 Cal., 79.

Nor can a bill in equity be maintained to restrain the execution of a decree in equity on the ground that it is erroneous both as to the law and the facts.

Daley *vs.* Pennie, 86 Cal., 552.

And the rule applies to everything which *might* have been litigated on the application for distribution.

The Wm. Hill Co. *vs.* Lawler, 116 Cal., 359.

Crew *vs.* Pratt, 119 Cal., 149.

Freeman *vs.* Rahm, 58 Cal., 111.

The averment of the complainants in the case at bar in regard to the proceedings on final distribution has already been considered (See pp. 15-17 hereof). The pleader

does not state that any appeal from this decree was taken to the Supreme Court, but the reports show that the complainants here did take such an appeal and that it was dismissed, the Court saying: "The appellants are con-"cluded by the decisions of this Court upon their other "appeals. They are no longer parties in interest."

Re Blythe, 115 Cal., 553.

A similar decision was made upon the appeal of The Blythe Company, the cross-complainant herein.

Re Blythe, 115 Cal., 554.

OUTLINE OF THE ARGUMENT.

We shall argue that the decisions of the State Courts referred to in the bills are conclusive against the appellant's claims, and that the bills show no valid ground for attacking or disregarding them; that the State laws permitting aliens to inherit ,and in relation to the institution of heirship, are not in conflict with any treaty, or an invasion of the treaty-making power, or in violation of any Federal provision, but are valid laws; that, even if it were otherwise, the decisions of the State Courts of Probate cannot be attacked in the present suit, because said Courts are Courts of general jurisdiction to whose administration matters of probate are expressly confided, and that no review of their decisions, except on appeal, or any retrial of the questions determined by them, is permitted by the State law, or permissible in the Federal Courts.

We shall further argue that no Constitutional question is involved in the case; that the bills show no ground of Federal jurisdiction, as was, in effect, decided by this Court on writ of error to the State Supreme Court; that, inasmuch as the Circuit Court decided, among other things, that the bills show no equity, and as this Court cannot consider the correctness of that decision on certificate, it disposes of all the appellant's interest; and that it would do the appellants no good to reverse the only part of the decree which is before this Court.

I.

THE JUDGMENTS OF THE STATE COURTS ARE CONCLUSIVE AGAINST THE RIGHT OF THE APPELLANTS TO MAINTAIN THIS SUIT.

The following propositions cannot be denied or disputed, viz.: that the Superior Court of San Francisco is a Court of general jurisdiction (pp. 27-8 hereof); that said Superior Court is the only State Court authorized to take original jurisdiction of "matters in probate"; that, inasmuch as it is expressly averred that Thomas H. Blythe died *a resident of the City and County of San Francisco*, and left estate therein (Tr., p. 6-7, and p. 29), the Superior Court of San Francisco had jurisdiction to administer on his estate (see p. 29 hereof); that said Court three times decreed that Thomas H. Blythe had instituted the appellee his heir; that these decrees were repeatedly affirmed

by the highest Court of the State; that, so far as the State law can make them so, such decrees are final and conclusive; that no attempt was ever made to remove any part of the proceedings to the local Federal Court; that a writ of error from this Court was sued out by the complainants here and that such writ was dismissed for want of jurisdiction; that no sort of fraud, concealment, or unfairness in the proceedings before any of the State Courts is charged by the complainants; but, on the contrary, that it is expressly averred that the fact of the non-resident alienage of the appellee Florence at the time of descent cast "*was made plainly to appear*" to the State Courts.

Such being the case, the question suggests itself as to why these adjudications of the State Courts should be treated as absolute nullities, and void on a collateral attack, as is sought to be done by the appellants here. Let us examine the reasons presented in support of such position:

(1). The bills state in general terms that the State Courts decided in favor of the appellee "without any jurisdiction so to do" (Tr., p. 10, and p. 32), and that their determinations were "idle forms" (Tr., p. 11, and p. 12), and "a fraud upon the laws of the United States and upon the "complainants" (Tr., p. 34).

As a general rule, mere epithets and conclusions are unavailing in a bill in equity.

Van Weel *vs.* Winston, 115 U. S., 237-8.

Fogg *vs.* Blair, 139 U. S., 127.

Dillon *vs.* Barnard, 21 Wall., 437.
U. S. *vs.* Ames, 99 U. S., 45.
Pullman Co. *vs.* Mo. Pac. Co., 115 U. S., 596.

This general rule applies to averments of want of jurisdiction.

Hanford *vs.* Davies, 163 U. S., 279.
Ritchie *vs.* McMullen, 159 U. S., 241-2.
Leavey *vs.* Long, 131 U. S. (Appendix CCXVIII).

We therefore dismiss these phrases from consideration.

(2). The bill puts forward, as one of the reasons why the decrees of the State Courts were utterly void, the statement that the decision of the State Supreme Court in favor of the appellee was in conflict with its previous decision (Tr., p. 10). The decision in favor of the appellee was based upon Section 1387 of the Civil Code (quoted on p. 7 hereof), providing the way in which the father of an illegitimate child could institute such child his heir (Blythe *vs.* Ayres, 96 Cal., 532). It is in this particular that the decision is claimed to be in conflict with previous decisions. The State Court gave reasons for not considering the previous decisions as binding authority (96 Cal., p. 590). But we are not concerned with the sufficiency of those reasons.

Passing, for a moment, the alienage question, the State Legislature has the unquestioned power to provide for inheritance by illegitimate children.

Lessee of Brewer *vs.* Blougher, 14 Pet., 178.

And the interpretation of State statutes, within their power to enact, is the peculiar province of the State Courts, whose decisions thereon are binding upon the Federal Courts.

Baltimore Co. *vs.* Baltimore Belt Co., 151 U. S., 137.
Forsyth *vs.* Hammond, 166 U. S., 518-19.
Oakes *vs.* Mase, 165 U. S., 364.
Balkam *vs.* Woodstock, 154 U. S., 188-9.
Bauserman *vs.* Blunt, 147 U. S., 647.
Morley *vs.* Lake Shore Ry., 146 U. S., 167.
McIlvaine *vs.* Brush, 142 U. S., 155.
South Branch Co. *vs.* Ott, 142 U. S., 628.
Chicago Bank *vs.* Kansas Bank, 136 U. S., 235.
Gormley *vs.* Clark, 134 U. S., 348.
Peters *vs.* Bain, 133 U. S., 670.
Hanrick *vs.* Patrick, 119 U. S., 169.
McArthur *vs.* Scott, 113 U. S., 391.
Claiborne County *vs.* Brooks, 111 U. S., 410.
Moores *vs.* Nat. Bank, 104 U. S., 625.
Orvis *vs.* Pavill, 98 U. S., 177.
Walker *vs.* State Harbor Cmrs., 17 Wall., 648.
Leffingwell *vs.* Warren, 2 Black, 603.
Suydam *vs.* Williamson, 24 How., 427.
Green *vs.* Lessee of Neal, 6 Pat., 291.
Elmendorf *vs.* Taylor, 10 Wheat., 159.

This principle is carried so far that where a federal Court decides a new question of State law, and the State Courts subsequently take a different view of it, the fede-

ral Courts will abandon their decision and follow the State Courts.

Bauserman *vs.* Blunt, 147 U. S., 647.
Oakes *vs.* Mase, 165 U. S., 364.

And so, where the State Court decides a State question, and this Court follows it, and the State Court subsequently changes its view, this Court will change also, and follow the State Court in its new view.

Green *vs.* Lessee of Neal, 6 Pet., 291.
Suydam *vs.* Williamson, 24 How., 427.

In other words, the federal Courts will follow the latest decision of the State Court upon State questions. And such is the present doctrine of this Court.

It is idle, therefore, to complain to the federal Court that the State Court has overruled its own decisions. Even if the State Court should disregard a decision *of this Court* upon a State question, this Court would not interfere.

Giles *vs.* Little, 134 U. S., 648-9.

Nor is there any question here of the exceptional case of negotiable instruments acquired for value upon the faith of a State decision such as was presented in Gelpcke *vs.* Dubuque (1 Wall., 175). Such a feature does not enter into the question whether the appellee was in-

stituted an heir of her father, or whether the appellants were his next of kin.

Bacon *vs.* Texas, 163 U. S., 221.
Hanford *vs.* Davies, 163 U. S., 273.

Nor is the commission of error in decisions upon State questions the invasion of a federal right.

Arrowsmith *vs.* Harmoning, 118 U. S., 194.
Re Converse, 137 U. S., 631.
Leffingwell *vs.* Warren, 2 Black, 603.

(3). The bill charges that the State statute permitting aliens to inherit is in conflict with *the State Constitution* (Tr., p. 10). The provision of the Constitution of 1849 was as follows:

> Sec. 17 (Art. 1). "Foreigners who are or who may "hereafter become *bona fide* residents of this State "shall enjoy the same rights in respect to the pos- "session, enjoyment, and inheritance of property as "native-born citizens."

The construction which this received was that the alien must be a resident at the time of descent cast (Farrell *vs.* Enright, 12 Cal., 450); but that the Constitution was *not a grant of, but a limitation upon* legislative power, and that the Legislature could extend privileges to aliens who did not come within the class designated by the Constitution, and that, consequently, the Legislature could

permit non-resident aliens to inherit if they appeared and claimed the property within a fixed period.

People *vs.* Rogers, 13 Cal., 160.

In 1874, the Legislature enacted the Civil Code, which contains the following provisions:

Sec. 671 "Any person, *whether citizen or alien*, may "take, hold, and dispose of real property, real or per- "sonal, within this State" [in effect July 1, 1874].

Sec. 672. "If a non-resident alien takes by succes- "sion, he must appear and claim the property within "five years from the time of succession or be barred. "The property, in such case, is disposed of as pro- "vided in Title VIII, Part III, Code of Civil Pro- "cedure" [escheat].

Sec. 1404. "Resident aliens may take in all cases "by succession as citizens; and no person capable of "succeeding under the provisions of this title is pre- "cluded from such succession by reason of the alien- "age of any relative; but no non-resident foreigner "can take by succession unless he appears and claims "such succession within five years after the death "of the decedent to whom he claims succession."

These provisions have not been repealed. In 1879, the State adopted a new Constitution which contained the following provision [supposed to have been aimed by its sponsors at Mongolians]:

Sec. 17 (Art. 1). "Foreigners *of the white race or* "*of African descent*, eligible to become citizens of "the United States, under the naturalization laws "thereof, while *bona fide* residents of this State, shall "have the same rights in respect to the acquisition,

"possession, enjoyment, transmission and inheri-
"tance of property as native-born citizens."

But the same construction was given to this as was given to the corresponding provision in the preceding Constitution, *i. e.*, that it was a limitation upon, and not a grant of, legislative power, and that, under the Code provisions above quoted, aliens could inherit.

State *vs.* Smith, 70 Cal., 153.
Estate of Billings, 65 Cal., 593.
Lyons *vs.* The State, 67 Cal., 380.
Carrascos *vs.* The State, 67 Cal., 385.

These decisions were cited to the State Supreme Court, upon the appeal from the decree of heirship (see 96 Cal., 543), and, as we are informed by the bills here, the fact of non-resident alienage was "made plainly to appear" (Tr., p. 9). But the proposition was so thoroughly settled that the Court did not see fit to notice it. And it is manifest that the above construction is correct; for State Constitutions are considered as limitations upon, and not as grants of, legislative power (Giozza *vs.* Tiernan, 148 U. S., 661.) And Section 22 of Article 1, providing that the various provisions of the Constitution shall be regarded as "mandatory and prohibitory," has not the slightest bearing upon the scope of the various provisions. Its only purpose was to prevent any provision from being held to be "directory" merely, a construction which had, in some instances, been given to constitutional provisions.

But, whether the construction of the State Court was right or not, it is nevertheless the settled construction of that Court; and the federal Courts are bound by that construction. The decisions of this Court make it clear that it will not enquire whether a State statute is in collision with the State Constitution.

Long Island Co. *vs.* Brooklyn, 166 U. S., 688.
Adams Express Co. *vs.* Ohio, 165 U. S., 219.
Norton *vs.* Shelby County, 118 U. S., 439.
Fallbrook Ir. Co. *vs.* Bradley, 164 U. S., 155.
Miller *vs.* Cornwall Ry. Co., 166 U. S., 519.
Stutsman *vs.* Wallace, 142 U. S., 306.
Gut *vs.* The State, 9 Wall., 35.

It is of no avail to the appellants that one of their bills states that "neither the said Superior Court nor the said "Supreme Court *considered adjudged or construed*, in "making its decision, the said Section 17, of Article I, "and said Section 22, of Article I, of the Constitution of "the State of California; nor were the rights of your ora-"tors under those sections adjudged or determined by "either of said Courts, or by its decision" (Tr., p. 10).

The question of the capacity of the alien to inherit *was necessarily involved in and determined by the decrees that she did inherit.* If that question was so determined, it would not make the slightest difference whether the Court "considered or construed" any particular provision or not. But it might be added that the mental process

of the Justices of the State Court is not something which the pleader could know anything about; nor is it a thing which the Federal Courts will inquire into. And certainly, defeated litigants cannot be heard to say that the State Courts did not give due consideration to the legal bearings of facts which were "made plainly to appear" to them, as was the case here (see Tr., pp. 10, 11, 31, 32, and 35), and concerning which the report shows that the decisions were cited (see 96 Cal., p. 543).

(4). The bills charge that the provisions permitting aliens to inherit are in contravention of Section 1978 of the U. S. Revised Statutes (Tr., pp. 32 and 34). That section is as follows:

> Sec. 1978. "All *citizens* of the United States shall "have *the same* right, in every State and Territory, "*as is enjoyed by white citizens thereof* to inherit, pur- "chase, lease, sell, hold and convey real and personal "property."

Several observations upon this section at once present themselves. In the first place, it applies only to "citizens"; and the refrain of the appellant's song is that the appellee was not a citizen. In the second place, the purpose of the provision was merely to put all citizens on an equality with "white" citizens. It does not require any particular plane. It does not undertake to enact what rights white citizens shall have. It would not be infringed if, in the matter of inheritance, no rights at all should be given to white citizens. It leaves that to the

States, only requiring that all citizens shall be treated alike in the respects mentioned. Now, the bill does not allege that the appellants are not white citizens. For all that appears to the contrary, they are of the same color with the appellee. Nor do the provisions permitting aliens to inherit as if they were citizens make any distinction as to color. The section has not the remotest bearing upon the case in hand.

(5). The third amended and supplemental bill charges that "said Section 1387 does not, in terms, operate beyond "the geographical boundaries of the State of California, "and it had no operation or effect at any time in the King-"dom of Great Britain, nor did any alleged action under "it; and it had no operation or effect upon said Florence "or her right to said real property at the time of descent "cast or prior thereto, nor did said judgment so operate." (Tr., p. 34.)

The property, however, is in California, and Thomas H. Blythe was a citizen of California, and the document which formed the basis of the State decisions was executed in California, in the form provided by the laws of California. That the property is in the State is expressly averred. It is also averred that Blythe was a citizen and resident of the State at the time of his death "and before" (Tr., p. 29). It is not averred that he was not a citizen and resident at the time the document was executed; and since the presumption is not only in favor of the regularity of the judgments of a Court of general jurisdiction, but

is also against the pleader, it must be assumed that he was a citizen and resident at the time in question; and the decision of the Supreme Court shows that the document was executed in accordance with the forms required by the laws of California. The question is, therefore, whether a citizen and resident of California can, by complying with the forms prescribed by the local laws institute his illegitimate child, who is a non-resident alien, his heir, so far as property in the State is concerned. To state this is to sufficiently answer it. So far as the question of the operation of the State laws outside the limits of the State is concerned, what is the essential difference between executing an institution of heirship and executing a will? But would any one contend that a will of property in California could not be made in favor of a non-resident alien? The State Courts may, if they catch an alien here, even compel him to act according to their notions of equity, even as to land in a foreign country. (Cole *vs.* Cunningham, 133 U. S., 107.)

The State Supreme Court gave a very thorough consideration to the matter (see 96 Cal., 561-576), and we do not think it necessary to add anything to the reasoning of the learned Justice who wrote the opinion. His conclusion was plainly right.

But, whether right or wrong, the State decisions are in our favor; and, aside from the operation of any federal provision (which we shall consider below), the State deci-

sions as to the operation of the State laws are conclusive, so far as State property is concerned.

It may be added, however, that the point is merely another way of phrasing the proposition that an alien cannot inherit. For suppose that the appellee had been born in California of a California mother, but had taken up her permanent residence in England, and had been a nonresident at the time of the institution of her heirship and at the time of descent cast! Could not the same argument as to the operation of the California law beyond the State boundaries have been made? But what Court would pay any attention to it? Now, the only difference between that supposed case and the case made by the bill is the alienage of the illegitimate child. But if an alien can inherit lands in this State, she can certainly be instituted heir to such lands. Therefore, we say that the position is merely another way of phrasing the alienage question. *So far as the State law is concerned*, the right of aliens to inherit, and, consequently, to be instituted heirs, is clear to a demonstration. Leaving it, we proceed to examine whether there is any federal provision which nullifies the State laws on the subject.

(6). The appellants contend that there is such federal provision, and in this regard the bill refers to Section 10, of Article I, of the Constitution of the United States, which provides that "no State *shall enter into any treaty*, alliance or confederation." In this regard, the third amended and supplemental bill charges that—

"said sections [permitting aliens to inherit], and "each of them, in an encroachment upon, and an in- "vasion and violation of and a substitution for the "treaty-making power of the United States, and, if "enforced, operate as treaty provisions between the "State of California and all foreign governments, "and were, and each of them is, void and in conflict "with and forbidden by Section 10, Article I, of the "Constitution of the United States, and with the "treaty-making power thereof" * * * (Tr., p. 33).

And, in regard to the Section providing for the institution of heirship, this bill charges that—

"said section, as construed by the Court, was and is "against Article I, Section X, of the Federal Consti- "tution, and an invasion of the jurisdiction of inter- "national intercourse between the United States "Government and the Government of England, "which jurisdiction is exclusively with the United "States, and was and is unconstitutional and void "because thereof, and because of a lack of power and "jurisdiction in California or its Courts to give said "statute the operation which it was adjudged by "said Court to have, and invades the treaty-making "power of the United States." (Tr., p. 8.)

So much for the "treaty-making power." With reference to actual treaties the showing is as follows: The second amended and supplemental bill charges that—

"the laws in force in the State of California in the "year 1883, when the said Thomas H. Blythe died, "relating to the rights of foreigners and aliens to "take real property by succession as heirs-at-law of

> "a deceased citizen of California, were *the treaty of* "*1894* between his Britannic Majesty and the United "States" * * * (Tr., p. 8).

No specific part of such treaty is referred to. The third amended and supplemental bill avers that Sections 671 and 672 (permitting aliens to inherit) and Section 1387 (in relation to the institution of heirship)—

> "are and each of them is in conflict with *existing* "*treaties* between the United States of America *and* "*Russia and Switzerland and France* and England" (Tr., p. 36).

The only provision of the federal Constitution referred to in these bills is Section 10, of Article I, providing that "no State shall enter into any treaty, alliance, or con- "federation." It would seem ludicrous to say that the Code provisions referred to constitute a treaty. They no more constitute a treaty than they constitute an alliance or a confederation. And, notwithstanding some of the language of the bill, we hardly think that the contention is that the legislative provisions in question constitute a treaty. The idea seems to be that they deal with subjects which either are or might be regulated by a treaty; and that, for that reason, they are not only void, but infect with invalidity the judgments of Courts of general jurisdiction based upon them.

If it is necessary to do more than state such wild imaginings, we would submit, first, that there is no treaty covering the case; second, that said legislative provisions

are not an invasion of the treaty-making power; and, third, that even if said provisions were an invasion of the treaty-making power, or a violation of an existing treaty, it would not make void the judgments of State Courts of general jurisdiction. We proceed to consider these propositions separately.

a. There is no treaty which covers the case. The bills aver that the appellee was at the time of descent cast a British subject. Such being the case we do not dwell upon the vague averment that the Code provisions referred to are in conflict with treaties between the United States "and Russia and Switzerland and France." It is sufficient to say that there is no treaty with either of those powers which deals with the rights which the United States shall accord to British subjects. The only averment as to a treaty with Great Britain is a vague reference to the treaty of 1794. But that treaty relates only to the aliens who held lands at the date of that treaty.

Harden *vs.* Fisher, 1 Wheat., 300.

No other treaty is mentioned, and there is none which covers the case. (See the volume of "Treaties and con-"ventions concluded between the United States of Amer-"ica and other Powers," published by the Government Printing Office in 1889.) The questions certified, or some of them, proceed upon the basis that no such treaty exists. (See question X, p. 52, and questions XIII, XIV, and XV, p. 53.) Nor have we any reason to suppose from the

course of the litigation up to this point that it will be claimed that any such treaty exists.

If there was any treaty on this subject, it would be in our favor. For no nation—and certainly not Great Britain—would be guilty of the barbaric folly of stipulating for the imposition of disabilities upon her own subjects.

b. The provisions of the Code are not an invasion of the treaty making power. If the provisions of the California Code permitting aliens to inherit are an invasion of the treaty making power, and for that reason void, it must follow that any State provision on the subject would be equally void for the same reason. In other words, if a provision *permitting* aliens to inherit be an invasion of the treaty making power, a provision *forbidding* aliens to inherit must be so too. In still other words, any provision on the subject, one way or the other, must be void. Now it would not increase the power of the State that it adopted other provisions along with the forbidden provision. If it has no power to adopt such a provision by itself, it has no power to adopt it as part of a system. Therefore, the statute of California adopting the common law as the basis of her jurisprudence, could not operate as a law against inheritance by aliens. The necessary result of the appellants' position would be that there is not, and never has been, *any* law in force in the State (or in any other State) either for or against inheritance by aliens. And there cannot be, except at the will and pleasure of foreign nations, for no nation need make any treaty on the sub-

ject unless it sees fit to do so. And it would not help the matter to say that the federal Courts could intervene. For if we assume that the federal Courts have any probate jurisdiction as such, i. e., aside from a "controversy" between parties, they have no power to make laws, but only to expound and apply them; and, upon the appellants' argument there would be no law to administer, and could not be without the consent of foreign nations.

But this is not the only absurdity which would result from the sanction of the appellants' position. Anything relating to the rights of aliens may be the subject of a treaty.

Geffroy *vs.* Riggs, 133 U. S., 267.

Their lives and liberties are as much within the treaty making power as their property. Hence (according to the logic of appllants' position) all the State laws protecting them for murder, rapine and other violence, are "an inva- "sion of the treaty making power" and void. No Court would have any jurisdiction to enforce such void laws, and all the State judgments in that regard would be without jurisdiction and mere "idle forms."

Upon the same principle the State laws as to marriage would not apply to aliens within their borders, either with other aliens, or with women of the State, and such marriages could not be recognized even as to property within the State. So the State law of wills would not apply to the wills of aliens either resident or non-resident. So the

State law of escheat would not apply to the property of aliens within the State. And the principle could not be confined to the individual rights of aliens. It would have to apply to their corporate rights as well. And the result would be that the State laws would not apply to foreign corporations doing business in their territory.

The principle would have to be extended even further. Treaties are on the same footing as laws.

> Whitney *vs.* Robertson, 124 U. S., 190.
> The Chinese Exclusion Case, 130 U. S., 600.
> Horner *vs.* U. S., 143 U. S., 571.
> Fong Yue Ting *vs.* U. S., 149 U. S., 720-1.

So that if the treaty making power be so exclusive in its nature as, though unexercised, to nullify all State legislation upon subjects as to which a treaty *might* be made, it would follow that there would be similar results as to State legislation upon any and all subjects as to which a federal law *might* be enacted. It is hardly necessary to say that such is not the case. We have not thought it necessary to explore the authorities in relation to concurrent powers of the Federal and State Governments. We give, however, in a note on the next page a few cases which have fallen under our notice.

But we are not left to general reasoning. The very question which the appellants seek to agitate has long

ago been settled by the repeated decisions of this Court, as we now proceed to show.

In Chirac *vs.* Chirac, (2 Wheaton, 259) it was held that alien heirs could inherit from a naturalized citizen of Maryland, because the statute of the State so provided, the Court, speaking through Chief Justice Marshall, saying: "*This question depends on the laws of Maryland.*" The law of that State (like the law of California) provided that the alien heir should appear and claim the property within a fixed period. The Court said that this operated as a condition subsequent, but that its performance was dispensed with by a later treaty. [Mem.: *It is not averred here that the appellee did not appear and claim the property within the required period;* and the contrary is to be inferred from the record.]

In Spratt *vs.* Spratt (1 Peters, 343), one of the lots in controversy was adjudged to pass to an alien heir by virtue of a State statute. Chief Justice Marshall, delivering

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Note. Bridging, improving and regulating navigable waters.
Willamette Bridge Co. *vs.* Hatch, 125 U. S., 1.
Cardwell *vs.* Am. Bridge Co., 113 U. S., 205.
Escanaba Co. *vs.* Chicago, 107 U. S., 678.
Packet Co. *vs.* Catlettsburg, 105 U. S., 559.
Pound vs. Turck, 95 U. S., 459.
Counterfeiting foreign bonds.
U. S. *vs.* Arjona, 120 U. S., 480.
Laws relating to the militia.
Presser *vs.* Illinois, 116 U. S., 252.
Laws relating to crimes on board a foreign ship in a local port.
Wildenhus' Case, 120 U. S., 1.
A statute of limitations for suits which might be removed to the federal Courts.
Mitchell *vs.* Clark, 110 U. S., 631.
Bankruptcy and insolvency laws.
Butler *vs.* Gorley, 146 U. S., 303.

the opinion saying: "*The title to the lots in controversy de-*
"*pends on the construction of an act of the State of Maryland.*"

The case came before the Court a second time, and was again disposed of upon a consideration of the State statute, the Court saying: "Since aliens are incapable of taking by descent, the answer to this question *depends on* "*the enabling act of the State of Maryland* in the year 1791."

Spratt *vs.* Spratt, 4 Peters, 393.

In Levy *vs.* M'Cartee (6 Peters, 102), the question was whether, in New York, a citizen could inherit collaterally from another citizen, when the former must make his pedigree through mediate alien ancestors. It was held that he could not. But this result was arrived at upon a consideration of the New York law. And Mr. Justice Story, delivering the opinion, said: "*The question is one* "*of purely local law*, and as such must be decided by this "Court." (p. 109.)

In Beard *vs.* Rowan (9 Peters, 317-18), one of the questions was whether one Allen Campbell, an alien, could take and hold land in the State of Kentucky, under an act of that State which extended the privilege to aliens who had resided in the State for two years. It was held that he could, and the Court, speaking through Mr. Justice Thompson, said:

> "That preamble evidently shows that the intention
> "of the legislature was to make a general provision
> "for removing the disability of aliens to hold real
> "estate, and this, founded upon State policy, doubt-

"less for the purpose of encouraging the settlement "of the country. * * * *No constitutional objection* "*can be made to this act.* It does not profess to natur- "alize aliens. It is not necessary that they should "be made citizens in order to hold and pass real es- "tate; and the condition upon which this may be "done, *is a matter resting entirely with the State legisla-* "*ture.*"

In Mager *vs.* Grima (8 How., 490) the Court sustained a law of Louisiana imposing a tax on legacies to aliens, which did not apply to legacies to citizens or to aliens domiciled in the State. And Chief Justice Taney, delivering the opinion, said:

"Now, the law in question is nothing more than "an exercise of the power which every State and "sovereignty possesses, of regulating the manner "and term upon which property, real or personal, "within its dominion may be transmitted by last will "and testament, or by inheritance; and of prescrib- "ing who shall and who shall not be capable of tak- "ing it. *Every State or nation may unquestionably re-* "*fuse to allow an alien to take either real or personal* "*property situated within its limits, either as heir or* "*legatee*, and may, if it thinks proper, direct that "property so descending or bequeathed shall belong "to the State. In many of the States of this Union "at this day real property devised to an alien is liable "to escheat. And if a State may deny the privilege "altogether, it follows that when it grants it, it may "annex to the grant any conditions which it sup- "poses to be required by its interests or policy."

The doctrine of the preceding case was approved and applied in Prevost *vs.* Greneaux (19 How., 7), and in Frederickson *vs.* Louisiana (23 How., 447).

In Airhart *vs.* Massieu (98 U. S., 491), the Court recognized and applied the principle that the property rights of aliens were controlled by the State law.

In Hauenstein *vs.* Lynham (100 U. S., 483), the right of the alien to inherit was sustained under the treaty with Switzerland. But the Court recognized the principle that in the absence of a treaty the State statutes would control, and speaking through Mr. Justice Swayne, said:

> "The law of nations recognizes the liberty of every "government to give to foreigners only such rights, "touching immovable property within its territory, "as it may see fit to concede. (Vattel, book 2, c. 8, "Sect. 114.) *In our country this authority is primarily "in the States where the property is situated*" (p. 484).

In Griffith *vs.* Cody, 113 U. S., 96, the principle was applied to the Constitution of California in force at the period then under consideration.

In Hanrick *vs.* Patrick (119 U. S., 156), the principle that in the absence of a treaty the property rights of aliens depends upon the State laws was applied to Texas titles in an elaborate opinion by Mr. Justice Mathews.

The question, therefore, has been repeatedly decided by this Court against the appellants' view, and it would seem that if any question can be considered settled this ought to be so.

The doctrine is only a branch of a wider principle, which was stated by Mr Justice Shiras in a recent case as follows:

"It is a principle firmly established that to the law "of the State in which the land is situated, we must "look for the rules which govern its descent, aliena- "tion and transfer, and for the effect and construc- "tion of wills and other conveyances."

De Vaughn *vs.* Hutchinson, 165 U. S., 570.

And such has always been the doctrine of the Court.

U. S. *vs.* Crosby, 7 Cranch, 115.

Clark *vs.* Graham, 6 Wheat., 577.

Kerr *vs.* Moon, 9 Wheat., 570.

McCormick *vs.* Sullivant, 10 Wheat., 202.

McGoon *vs.* Scales, 9 Wall., 23.

U. S. *vs.* Fox, 94 U. S., 320.

Brine *vs.* Insurance Co., 96 U. S., 627.

Robertson *vs.* Pickrell, 109 U. S., 610.

Ridings *vs.* Johnson, 128 U. S., 224.

Cope *vs.* Cope, 137 U. S., 682.

Lynch *vs.* Murphy, 161 U. S., 247.

Magoun *vs.* Ill. Trust Co., 170 U. S., 289.

From every point of view, therefore, the position that the provisions permitting aliens to inherit were beyond the power of the State to enact is destitute of every semblance of merit.

c. If the Code provisions permitting aliens to inherit, and in relation to the institution of heirship, were an invasion of the treaty making power, or even a violation of an actual treaty, the judgments of the State Courts would not be void or subject to attack in any way except on appeal or writ of error. It is

plain that, so far at least as the State can confer it, her Courts had complete jurisdiction of the proceedings, which resulted in final decrees in favor of the appellee. We have already stated the position in this regard, but we will briefly run over the matter again.

The Superior Courts are Courts of general jurisdiction, having full power over all "matters of probate" (pp. 27-8). Indeed, if we leave out the Court for the trial of impeachments (the Senate), and Justices of the Peace, who have jurisdiction only of money demands under $300, the Superior Courts are the only Courts of original jurisdiction in the State. In them is lodged, in the first instance, all the judicial authority of the State, whether at law or in equity or of statutory creation. There is no other class of State Courts which could possibly have jurisdiction of proceedings like those stated in the bill. The Constitution expressly gives them jurisdiction "of all matters of "probate," (p. 27), and that they "shall be Courts of "record." (Sec. 12, Art. VI.) When sitting in probate they have all the powers, both at law and in equity, which are necessary to the exercise of their probate functions (See p. 28); and the most complete and ample machinery for the investigation of such matters is provided by statute, including at least three formal methods of trying and determining the question of heirship (each of which was resorted to in this case), with appeals to the Supreme Court in each proceeding (pp. 35-46).

With the exception of a few small counties, which are

lumped together, there is one Superior Court for each county or city and county. The Superior Court of the City and County of San Francisco was, under the statute (quoted on p. 27 hereof), the only Superior Court of the State which could take jurisdiction of the estate of Thomas H. Blythe, because the bills aver that at the time of his death he was a resident of said city and county and left estate therein. (Tr., pp. 6-7 and p. 29.)

All the proceedings necessary to give the Superior Court of San Francisco jurisdiction of this particular estate, and of the three proceedings which resulted in the decrees in favor of the appellee, were taken. This appears to be so, not only because nothing is averred to the contrary, and therefore the presumption in favor of the action of Courts of general jurisdiction and the presumption against the pleader apply, but also because the bills aver that the appellants appeared in each proceeding and joined issue thereon. (See pp. 9, 14 and 16 hereof.) No attempt was made to remove any of said proceedings to the federal Courts, but they were allowed to pass to judgment in said Superior Court, and thereupon appeals were taken to the State Supreme Court, where the several decrees were affirmed. The appellants thereupon took a writ of error from this Court; but such writ was dismissed for want of jurisdiction. (Blythe *vs.* Ayres, 167 U. S., 746.)

The ultimate question decided by the State Courts was the right of the appellee to the property in suit as the heir of Thomas H. Blythe. The specific question on which

said ultimate question turned was whether the non-resident alienage of the appellee took away her capacity to inherit. This is not only apparent from the general frame of the bills, but is specifically stated. For the third amended and supplemental bill explicitly states that "your orators say that they do not controvert defendant's "title to said real property *if she can and did take the same* "*by inheritance* under the laws and facts set forth in this "bill." (Tr., p. 37.) Now, this question was necessarily involved in the decrees of the Superior Court. For it cannot be disputed that the appellee's capacity to inherit *was necessarily involved in the decrees that she did inherit.* Being necessarily involved, it would not matter whether the facts were actually litigated or not. In the subsequent suit in the Federal Court to quiet title to the property the probate decrees were conclusive of everything *which might have been litigated.*

Cromwell *vs.* County of Sac., 94 U. S., 352.
Stout *vs.* Lye, 103 U. S., 66.
Life Ins. Co. *vs.* Bangs, 103 U. S., 782.
Dimick *vs.* Revere Co., 117 U. S., 565-6.
Wilson *vs.* Deen, 121 U. S., 532-3.
Dowell *vs.* Applegate, 152 U. S., 327.
Morenhout *vs.* Higuerra, 32 Cal., 296.
Sullivan *vs.* Triunfo Co., 39 Cal., 459.
Byers *vs.* Neal, 43 Cal., 216.
Brummagim *vs.* Ambrose, 48 Cal., 368.
Parnell *vs.* Hahn, 61 Cal., 131.

In addition to this, the bills show that the question was actually litigated, the question of the appellee's non-resident alienage being "made plainly to appear." (Tr., pp. 9, 10, 11, 31, 32 and 35.)

The bills make no charge of fraud, concealment, unfairness or wrong of any kind in any of the proceedings before any of the State Courts. There is not even any suggestion of any want of information on their part. On the contrary, as just stated, it is expressly averred that the fact of non-resident alienage, on which appellants rest their case here, was "made plainly to appear" to the State Courts. The theory is that all the State decrees and decisions are absolute nullities, and subject to collateral attack. This theory is sought to be supported by general conclusions and epithets (which hardly amount to more than making faces at the decrees), and by the averment of the fact which it is said was "made plainly to appear" to the State Courts, viz., the non-resident alienage of the appellee at the time of descent cast.

The argument based upon this fact is that the State statutes permitting aliens to inherit or to be constituted heirs to lands in California are an "invasion of the treaty "making power," and therefore void, and that being void, the State Courts had no power to render judgments upon them. It is manifest that this theory assumes that the State Courts have no power to administer federal laws or treaties, and that whenever they meet one they are stricken with a sort of judicial paralysis, and that any

action on their part is in that connection *coram non judice*. We say that this is necessarily assumed, because if the State Courts *have* the power to pass upon such questions their action, however erroneous, would not be without jurisdiction.

It is probably a waste of time to refute such a proposition. Nevertheless we proceed to show how entirely destitute of foundation it is. The power of the State Courts to pass upon federal questions, where litigants do not exercise their right of removal to the federal Courts, is assumed by the provisions as to the revisory power of this Court over the decisisons of the State Supreme Court. For if their decisions be *in favor* of the federal right which is set up and claimed, this Court has no revisory power. Now it cannot be that the State Courts have power to pass upon federal questions one way but not the other. "If "it is judicial to hear and determine one way, it is like-"wise judicial to hear and determine the other." (Forsythe *vs.* Hammond, 166 U. S., 517). The theory of removal proceedings assumes the same concurrent power in the State Courts. For if the proceedings before them were *coram non judice*, there would be nothing to remove. The act of Congress expressly recognizes the concurrent jurisdiction of the State Courts, its provision being—

> "That the Circuit Courts of the United States shall "have original cognizance, *concurrent with the Courts* "*of the several States*, of all suits of a civil nature, at "common law or in equity, where the matter in dis-

"pute exceeds, exclusive of interest and costs, the "sum or value of two thousand dollars, and arising "*under the Constitution or laws of the United States, or* "*treaties made or which shall be made* under their au- "thority," etc.

Supp. to R. S., p. 611.

And this Court has said:—

"It must always be borne in mind that the Constitu- "tion, laws and treaties of the United States *are as* "*much a part of the laws of every State as its own local* "*laws and Constitution.* This is a fundamental prin- "ciple in our system of complex national policy."

Hauenstein *vs.* Lynham, 100 U. S., 490.

But if the State Courts have concurrent power to pass upon federal questions, how can their decisions upon such questions be said to be *coram non judice?* Why are they stricken with paralysis when a federal question presents itself? How can parties to proceedings in the State Courts, who have made no efforts for removal to the federal tribunals, but who have appeared before the State Courts and taken their chances of the litigation there, and after being defeated, have taken appeals to the State Supreme Court, and been defeated there, and have thereupon sued out a writ of error from this Court, and had it adjudged that this Court had no jurisdiction over the matter, calmly continue to litigate the very same questions in the Circuit Court?

Mays *vs.* Fritton, 20 Wall., 414.
Scott *vs.* Kelly, 22 Wall., 59.

The proposition that the State Courts have concurrent jurisdiction with the federal Courts to hear and determine federal questions, in the absence of proceedings for removal to the federal Courts, seems to meet and destroy the position taken in the bills of the appellants. But in pursuance of our duty to fully present the law bearing upon the case, we proceed to examine the decisions of this Court in cases in which jurisdiction of matters of probate has been entertained.

The first class of decisions consists of cases where, *pending administration*, litigation upon some specific matter connected with the estate which has not yet been passed upon by the probate Court, has been entertained by the federal court where the requisite conditions of citizenship exist.

Thus, a mortgage given by a deceased debtor in his lifetime may be foreclosed in a federal Court, if the holder of the mortgage be a citizen of another State, although the estate is then in process of administration in the probate Court. (Erwin *vs.* Lowry, 7 How., 172.)

So when the probate law (which was practically an insolvent law) provided that after the insolvency of the estate had been declared by the probate Court, no action should be maintained against the executor or administrator, but the assets should be distributed by the probate Court among the creditors, it was held that such law did

not, and could not, apply to a debt created out of the State, in favor of a citizen of another State, and that therefore an action could be maintained on such debt, in the federal Court, although administration was pending in the probate Court. (Suydam *vs.* Broadnax, 14 Peters, 67.)

So an heir, who had obtained a judgment against the administrator of his ancestor's estate, for failure to account for assets which came to his hands, may maintain in the federal Court, a bill against the administrator of the surety of the first mentioned administrator, for discovery, and for the application of the assets of the estate of the surety, to the payment of said judgment, although administration of the estate of the surety is pending. (Green *vs.* Creighton, 23 How., 90.)

So an heir, who is the citizen of another State, may maintain in the federal Court, a bill against the administrator who "had not yet made his final settlement," to obtain an accounting and a decree for the complainants' share of the estate. (Payne *vs.* Hook, 7 Wall., 426.)

So a bill by a widow may be maintained in the federal Court to enforce a trust as to property received from her by her husband in his life-time, though administration on the husband's estate be still pending—it not appearing that the question had been brought before either of said probate Courts. (Walker *vs.* Walker, 113 U. S., 73.)

So a federal Court has jurisdiction of an action against an administrator, upon a claim against the estate, if the

requisite conditions of citizenship exist, though administration in the probate Court be pending; and such a case, if commenced in a State Court, may be removed to the federal Court, under the local prejudice act. (Hess *vs.* Reynolds, 113 U. S., 73.)

So a citizen of New York, who is a judgment creditor of a decedent may maintain in the U. S. Circuit Court for Minnesota, a bill against an executor who has taken out letters testamentary in Minnesota, and who has in that State assets of the deceased, to have such assets applied to the satisfaction of the judgment, although the Minnesota administration remains unclosed, and although the assets were transmitted to Minnesota from an ancillary administration in California, which had been closed, the said assets being transmitted as the amount of a legacy left by the testator to the Minnesota executor. (Borer *vs.* Chapman, 119 U. S., 587.)

So when the principal administration was in Pennsylvania, and an ancillary administration was taken out in New Jersey, as to property there, which property at first went into the hands of the New Jersey executor, and after his death passed into the hands of an administrator *de bonis non*, whose accounts had been settled by the Orphan's Court, but no decree of distribution made, it was held that the Pennsylvania executor could maintain a bill in the federal Court for New Jersey to have the assets applied to a trust specified in the will. [Mem.: The statute of New Jersey provided that an executor or administrator

appointed in another State could sue in New Jersey without taking out letters there.]

Hayes *vs.* Pratt, 147 U. S., 557.

So, if the requisite conditions of citizenship exist, an heir may maintain in the federal Court a bill against an administrator and persons claiming to be interested in the estate, to determine the right of the complainant to a share of the estate, notwithstanding the pendency of administration in the probate Court. (Byers *vs.* McAuley, 149 U. S., 608).*

The principle of all such cases is that such relief is a recognized part of equity jurisprudence, and that the equity jurisprudence of the federal Courts cannot be interfered with by State provisions, but is always open to those whose citizenship entitles them to come into the federal Courts in proper cases.

It is to be observed, however, that all such cases assume that the proceedings of which the federal Courts took jurisdiction *were separate and independent proceedings*, and not such as were involved in the administrative proceedings in the probate Court, *as far as they had progressed* at the time of the commencement of the proceed-

*Note. Even in the cases above referred to the decrees in the federal Court merely *establish the right*, and leave the administration of it to the local court.

Yonley *vs.* Lavender, 21 Wall., 276.

Williams *vs.* Benedict, 8 How., 107.

But the judgment of a U. S. Circuit Court need not be presented as a claim against the estate, notwithstanding that the State statutes require judgments to be so presented.

Lawrence *vs.* Nelson, 143 U. S., 215.

ings in the federal Court. If a probate administration is to be regarded as *one connected proceeding*, necessarily involving all such suits as those entertained in the federal Court, the Court in which the proceeding was first commenced would have exclusive jurisdiction over it, the property of the estate being regarded as *in gremio legis*.

Byers *vs.* McAuley, 149 U. S., 615.
Re Chetwood, 165 U. S., 460.
Rio Grande R. R. *vs.* Gomila, 132 U. S., 478.
Tua *vs.* Carriere, 117 U. S., 208.
Heidritter *vs.* Elizabeth Co., 112 U. S., 304.

But if litigation like that in the cases above cited is to be regarded as independent and separate from the purely administrative proceedings, the federal Courts may under proper conditions of citizenship entertain them before they are commenced in the probate Court, or if so commenced, they may be removed to the federal Court by taking the required steps in due time. For example, a bill to determine the heirship of the various claimants to the estate of Thomas H. Blythe might have been commenced by the appellants in the federal Court for California, or, after it had been commenced by the appellee in the Superior Court, it might have been removed by the appellants to such federal Court by taking the course provided by the Act of Congress. And so of the proceedings for distribution.

The distinction between this class of cases and the case

at bar is that the appellants did *not* commence any proceeding in the federal Court, and did not make any attempt to have any proceeding in the Superior Court removed to the federal Court, but went into the State Court and took their chances of the litigation there, and on being defeated there, appealed to the State Supreme Court, and on being defeated there, took out a writ of error from this Court, which writ was dismissed for want of jurisdiction. (See Blythe *vs.* Ayres, 167 U. S., 746.) That is a very different case from those above cited.

The other classes of decisions to be noticed consists of cases where the federal Courts have entertained bills in equity after the local probate Courts have passed upon the matter. The distinguishing feature of this class of cases is *that the local law provided for such suits.* The federal Courts, in such cases, simply administer the local law, where the requisite conditions of citizenship exist. It is no doubt true that the local law cannot take away equitable remedies in the federal Courts. But, on the other hand, it is equally true that if the local law provides a remedy, that remedy can be resorted to in the federal Courts by a citizen of another State, upon the general proposition that "whenever a citizen of a State can go "into the Courts of a State to defend his property, * * "* a citizen of another State may invoke the jurisdiction "of the federal Courts to maintain a like defense." (154 U. S., 391.)

The Gaines cases will naturally suggest themselves in this connection. It will be remembered that the Louisiana Courts first admitted to probate a bogus will of Daniel Clark. Nevertheless, numerous suits were subsequently maintained in the federal Courts to try title to the property left by him. About half a century later Clark's real will (the will of 1813) was admitted to probate by the local Courts; but still the federal Courts entertained suits to try the title. This was because the probate of a will in that State was not conclusive as to real property. There were two kinds of action in which the validity of a will which had been admitted to probate could be drawn in question, so far as real property was concerned, viz., an action of revendication and an action of nullity. The precise distinction between these actions is not familiar to us; but in one way or another validity of the will could be subsequently drawn in question in the local Courts so far as real property was concerned. In this regard, in Gaines *vs.* Chew, this Court, speaking by Mr. Justice McLean, saying:

> "This remedy under the Louisiana law, and before "the Louisiana Courts, of ordinary jurisdiction, *would* "*be undoubted.* For, although those Courts cannot "annul the probate of a will, when presented col- "laterally, as a muniment of title, they inquire into "its validity."
>
> Gaines *vs.* Chew, 2 How., 650.

The same doctrine was laid down in Gaines *vs.* Hennen (24 How., 558). So, in Gaines *vs.* Fuentes, the ground of the decision was that the proceeding was authorized by the State law. And in this regard, Mr. Justice Field, delivering the opinion, after recognizing the authority of the decisions laying down the general rule that a decree admitting a will to probate could not be attacked in a subsequent proceeding, said:

> "But that such jurisdiction may be vested in the "State Courts by statute is there recognized, and "that *when so vested*, the federal Courts sitting in the "States where such statutes exist, will also entertain "jurisdiction in a case between proper parties."
>
> Gaines *vs.* Fuentes, 92 U. S., 21.

The same doctrine was acted on in Ellis *vs.* Davis. The Court, speaking by Mr. Justice Mathews, recognized the general rule that a court of equity would treat a decree admitting a will to probate as conclusive, saying, in this regard:

> "It is well settled that no such jurisdiction belongs "to the Circuit Courts of the United States, as courts "of equity; for courts of equity as such, by virtue of "their general authority to enforce equitable rights "and remedies, do not administer relief in such "cases." (p. 494.)

But the Court said that by the law of Louisiana the validity of the will could, in proper cases, be subsequently drawn in question in actions relating to real property (p. 499 et seq.), and went on to say:

"In those States where the probate, although con-
"clusive while in force as to personality and for the
"purposes of administration merely, is only *prima*
"*facie* evidence where the will is relied on as a muni-
"ment of title, its validity may become a question to
"be tried whenever and wherever a litigation arises
"concerning real property, the title to which is
"affected by it, just as in England, in actions of eject-
"ment between the heir and the devisee, or those
"claiming through them. In a State, of which New
"York is an example, where, *by its law, its own Courts*
"*of general civil jurisdiction are authorized* thus inci-
"dentally and collaterally to try and determine the
"question of the validity of a will and its probate
"in a suit involving the title to real property, there
"can be no question but that the Circuit Courts of
"the United States might have jurisdiction of such
"a suit, by reason of the citizenship of the parties,
"and in exercising it would be authorized and re-
"quired to determine, *as a Court administering the laws*
"*of that State*, the same questions." (p. 496.)

Ellis *vs.* Davis, 109 U. S., 485.

Where, however, the local law does *not* so provide, it is manifest that the decree of the probate Court cannot be disregarded, or impeached collaterally.

Herron *vs.* Dater, 120 U. S., 477-8.

Nor can it even be attacked on a bill in equity in the federal Courts by a citizen of another State.

This was first ruled in Tarver *vs.* Tarver. In that case the bill was brought by citizens of Georgia in the U. S. District Court for Alabama to set aside a will which had been admitted to probate, and for a distribution to the

heirs at law. It was held that this could not be done. And Mr. Justice Thompson, delivering the opinion, said:

> "And the bill cannot be sustained on the allegation "that the probate is void. An original bill will not "lie for this purpose. If any error was committed in "admitting the will to probate, it should have been "corrected by appeal. This is provided for by the "law of Alabama, which makes the County Court in "each county an Orphan's Court for taking the pro- "bate of wills, etc., and declares that if any person "shall be aggrieved by a definitive sentence, or judg- "ment, or final decree of the said Orphan's Court, he "may appeal therefrom to the next term of the Su- "preme Court in chancery, or in the District of Wash- "ington, to the Superior Court of that District. The "law also provides, that any person interested in "such will, may, within five years from the time of "the first probate thereof, file a bill in chancery to "contest the validity of the same; and the Court of "Chancery may thereupon direct an issue or issues in "fact, to be tried by a jury as in other cases. But "that after the expiration of five years, the original "probate of any will shall be conclusive and binding "upon all parties concerned; with the usual savings "to infants, femes covert, etc. (Toulmin's Dig., 887.) "We think that nothing has been shown to impeach "or invalidate this will, and that the bill cannot be "sustained for the purpose of avoiding the probate."

Tarver *vs.* Tarver, 9 Peters, 179-80.

This case was approved and followed in a case where the will had been admitted to probate under the Spanish laws, before Louisiana became a State.

Fouvergne *vs.* Orleans, 18 How., 470.

The same doctrine was laid down in the noted Broderick Will case, which came up from California, and related to its probate system. The Court upheld a forged will, whose admission to probate had been secured through perjured testimony, and speaking through Mr. Justice Bradley, after stating the rule, said:

> "Whatever may have been the original ground of "this rule (perhaps something in the peculiar con- "stitution of the English Courts) the most satisfac- "tory ground for its continued prevalence is, that the "constitution of a succession to a deceased person's "estate partakes, in some degree, of the nature of a "proceeding *in rem*, in which all persons in the world "who have any interest are deemed parties, and are "concluded as upon *res judicata* by the decision of the "Court having jurisdiction. *The public interest re-* "*quires that the estates of deceased persons, being deprived* "*of a master and subject to all manner of claims, should* "*at once devolve to a new and competent ownership;* and, "consequently, that there should be some convenient "jurisdiction and mode of proceeding may be ef- "fected with least chance of injustice and fraud; and "that the result attained should be firm and perpet- "ual."
>
> Case of Broderick's Will, 21 Wall., 509.

[Mem.: The complainants' in this case, who claimed to be heirs of Senator Broderick, were aliens, and hence the probate proceedings dealt with the rights of aliens.]

It will be observed of this case that the reason which it gives, viz., the interest of the public that titles should be settled, applies equally to succession through heirship as

to succession through a will, and Mr. Justice Bradley expressly uses the term "succession to a deceased person's "estate." And the doctrine and authority of the case were subsequently applied to the protection of the rights of purchasers claiming under an administration sale against the claims of heirs, who brought a bill in equity in the federal Court, no remedy provided by the local laws being applicable. This Court, after a careful examination of the laws of Louisiana, held that the doctrine of the case of Broderick's Will was controlling.

Simmons *vs.* Saul, 138 U. S., 439.

And see, also:

Robinson *vs.* Fair, 128 U. S., 153.
Caujolle *vs.* Ferrie, 13 Wall., 470.
Nougue *vs.* Clapp, 101 U. S., 554.
Scott *vs.* Kelly, 22 Wall., 57.
Parrish *vs.* Ferris, 2 Black, 606.
Bryan *vs.* Kennett, 113 U. S., 179.
Barrow *vs.* Hunton, 99 U. S., 80.
Jeter *vs.* Hewitt, 22 How., 371.
Miles *vs.* Caldwell, 2 Wall., 35.
Ingraham *vs.* Dawson, 20 How., 486.
Stockton *vs.* Ford, 18 How., 418.
C. & A. Rd. Co. *vs.* Wiggins, 108 U. S., 22.
Adams *vs.* Preston, 22 How., 488.
Randall *vs.* Howard, 2 Black, 589.

Now the law of California does not provide for again drawing in question the validity of probate decrees. On the contrary, as will appear from the statement of the case (pp. 35-8), the section providing for the formal proceedings to determine heirship expressly says that "the "final determination of the Court thereupon *shall be final* "*and conclusive* in the distribution of said estate, *and in* "*regard to the title to all the property of the estate of said d* "*eceased.*" (C. C. P., Sec. 1664.)

And the section in relation to decrees or orders of distribution provides that "such order or decree *is conclu-* "*sive* as to the rights of heirs, legatees, or devisees, sub- "ject only to be reversed, set aside, or modified on ap- "peal." (C. C. P., Sec. 1666, quoted on p. 45 hereof.)

Not only are there the foregoing provisions as to the particular proceedings under consideration here, but there is a general section which provides that—

> Sec. 1908. "The effect of a judgment or final order "in an action or special proceeding before a Court or "Judge of this State, or of the United States, having "jurisdiction to pronounce the judgment or order, "is as follows:
>
> "1. In case of a judgment or order against a spe- "cific thing, or in respect to the probate of a will, *or* "*the administration of the estate of a decedent*, or in "respect to the personal, political or legal condition, "*or relation* of a particular person, *the judgment or* "*order is conclusive* upon the title to the thing, the will "*or administration* or the condition *or relation* of the "person." * * *

These provisions are so clear as not to need construction. Nevertheless authorities are not wanting as to the conclusive effect of probate decrees The settled rule is that such decrees cannot be attacked either collaterally or by bill in equity.

The William Hill Co. *vs.* Lawler, 116 Cal., 359.
Crew *vs.* Pratt, 119 Cal., 139.
Goad *vs.* Montgomery, 119 Cal., 552.
Jewell *vs.* Pierce, 120 Cal., 79.
Langdon *vs.* Blackburn, 109 Cal., 19.
Daley *vs.* Pennie, 86 Cal., 552.
Re Griffith, 84 Cal., 107.
McClellan *vs.* Downey, 63 Cal., 520.
Freeman *vs.* Rahm, 58 Cal., 110.
Robinson *vs.* Fair, 128 U. S., 153.

As a matter of course, if the probate Court was without jurisdiction its decree would not be conclusive. Thus, if the decree was obtained by extrinsic fraud, "and with-" out notice to the party against whom it was rendered," it can be set aside (Baker *vs.* O'Riordan, 65 Cal., 368). So, if the notice required to be published was not published as required, the decree would be void (Pearson *vs.* Pearson, 46 Cal., 611). But these are very different cases.

There can be no pretense that the local law takes the case out of the rule established by the Broderick Will case and the other cases above cited.

II.

NO CONSTITUTIONAL QUESTION IS INVOLVED.

The rule with regard to federal questions, in general, which are relied upon to give jurisdiction to the Court below, is that they must appear from the plaintiffs' pleading.

Colorado Mg. Co. *vs.* Turck, 150 U. S., 143.
Tennessee *vs.* Union Bank, 152 U. S., 454.
Borgmeyer *vs.* Idler, 159 U. S., 408.
Press Publishing Co. *vs.* Monroe, 164 Fed., 110.
Muse *vs.* Arlington Hotel Co., 168 U. S., 436.

We should think that this rule would apply to the Constitutional questions which may be brought to this Court on appeal; for the case which this Court examines on appeal is the same case over which the lower Court had jurisdiction. But, however, this may be, this much at least is clear, viz.: that the constitutional question must arise somewhere *in the record*. The mere *assertion* that any particular federal question is involved goes for nothing.

Budzisz *vs.* Ill Steel Co., 170 U. S., 44.

Turning now to the appellants' bills, the only constitutional provision which is referred to, or with which any averment has the remotest connection, is Section X, of Article I, which provides that "no State shall enter into "any treaty, alliance, or confederation." We have shown

under Point I (what, indeed, is almost too clear for discussion) that the Sections of the California Code permitting aliens to inherit, and providing for the institution of heirship, do not constitute a treaty, and are not, in any view, an invasion of the treaty-making power. If this be so, the averment that the constitutional provision referred to is involved is merely frivolous and fictitious.

Wilson *vs.* North Carolina, 169 U. S., 595.

New Orleans *vs.* N. O. Water Works, 142 U. S., 87.

Hamblin *vs.* Western Land Co., 147 U. S., 532.

The constitutional question must be really and substantially involved.

New Orleans *vs.* Benjamin, 153 U. S., 424.

Even if the Code provisions referred to were in violation of a treaty that would not involve a constitutional question, for as already shown a treaty stands on the same footing as an Act of Congress.

Fong Yue Ting *vs.* U. S., 143 U. S., 571.

Chinese Exclusion Cases, 130 U. S., 600.

And if it be said that the Code deals with subjects which might be the subject of a treaty, the answer is that that does not make the question a constitutional one, any more than a State statute could be said to involve a constitutional question because it dealt with a subject which *might* be the subject of an Act of Congress. The constitu-

tional question must not be remotely or collaterally involved. *It must be controlling.*

Carey *vs.* Houston Ry., 150 U. S., 181.

An illustration of this is to be found in a recent case. The Constitution provides for the institution of federal Courts. Congress could not have established the lower federal Courts unless its action was authorized by the Constitution. But a question as to the jurisdiction of those Courts is not a constitutional question within the meaning of the Act of 1891.

Merritt *vs.* Bowdoin College, 169 U. S., 551.

Federal questions which are only collaterally involved do not give jurisdiction.

Leyson *vs.* Davis, 170 U. S., 36.

The assignments of error do not help the appellants. In the first place, a constitutional question cannot be imported into a case by means of assignments of error.

Ansbro *vs.* U. S., 159 U. S., 695.

Cornell *vs.* Green, 163 U. S., 80.

In the second place, the assignments of error do not refer to any constitutional provision except the one referred to in the bill, but merely state generally that the provisions of the Constitution were violated. This is insufficient.

Clarke *vs.* McDade, 165 U. S., 168.

Nor do the questions certified throw any light upon the question, for the observations just made apply to such questions.

We submit that it is perfectly plain that no constitutional question is involved.

III.

THE CIRCUIT COURT HAD NO JURISDICTION.

It is true that the requisite conditions of citizenship existed before the joinder and after the dismissal of the defendant Boswell M. Blythe; but it does not follow that the bills were improperly dismissed. In the first place, the question of jurisdiction arising from citizenship is not among the questions certified to this Court. Not a single one of the fifteen lengthy questions stated in the certificate says anything about the citizenship of the parties. In the second place, the object of the suit—the thing which the appellants sought to obtain from the Circuit Court—was a decision which should, either in terms or in effect, pronounce the decisions of the State Courts to be invalid and of no effect. Why else should the bills have so carefully set forth the decisions of the State Courts? If we are right in our position that the Circuit Court had no power to do any such thing, then we submit that it was without jurisdiction over the case. The case would be just the same in principle as if the appellants had filed their bill to remove the Governor of the State from his office. The

federal Courts have no jurisdiction to array themselves in hostility to the State government, either by depriving the officers of their offices or by setting aside or disregarding the valid judgments of the State Courts. The question of the validity of the judgments set forth in the amended and supplemental bills has been fully discussed, and it is not necessary to say anything further upon the subject.

The appellants will, doubtless, have a technical answer to this. They will say that the bills did not ask the Circuit Court to set aside or review the decisions of the State Courts, and that, if they are valid, it is for the defendant to set them up, and that the case should proceed until that shall be done. But the bills themselves show that the whole matter is concluded by valid judgments of the State Courts. Why should it be necessary for the defendants to have set forth something which is shown by the bills? We submit that there was no such necessity. The bills having set forth the State judgments showed on their face that no federal question was *really and substantially* involved.

Robinson *vs.* Anderson, 121 U. S., 524.

The following cases show that the objection goes to the jurisdiction.

Nougue *vs.* Clapp, 101 U. S., 554.
Randall *vs.* Howard, 2 Black, 589.
Barrow *vs.* Hunton, 99 U. S., 80.

Forsyth *vs.* Hammond, 166 U. S., 520.
Robinson *vs.* Fair, 128 U. S., 153.

It is not one of the cases where a citizen of another State can come into the federal Court for relief against fraud in obtaining a judgment in a State Court. For not only are decrees *in rem* of an exceptional character, but no fraud is charged.

It may be added, in conclusion of this point, that the matter was, in effect, passed upon by the Court when it dismissed the writ of error for want of jurisdiction. The record in the Superior Court must necessarily have been taken to the Supreme Court by the appeal, and brought to this Court by the writ of error. The very same record must be produced to the Circuit Court if it should proceed with this cause. This Court, upon that record, decided that it had no jurisdiction to review the State decision, thereby necessarily affirming that the decision against the appellants here either did not involve a federal question, or that some State ground existed which was sufficient to support the decision. If this Court had no jurisdiction, how had the Circuit Court jurisdiction? No new case is made. The bills simply go over the old ground. And, furthermore, the briefs on file on the motion to dismiss the writ of error will show that the same ground of non-resident alienage was presented to this Court, which is sought to be presented to it on this appeal.

Blythe *vs.* Ayres, 167 U. S., 746.

We do not say anything on the question as to whether the objections to the complainants' bills ought to have been taken in the Circuit Court by demurrer instead of by motion. Such question does not go to the power of the Circuit Court, and cannot be presented on certificate.

IV.

THE APPELLANTS' INTEREST IN THE CAUSE HAS CEASED BY REASON OF THEIR FAILURE TO ATTACK THE DECREE AGAINST THEM ON THE MERITS.

If we are right in the preceding contention that the question of the validity of the decrees of the State Court, and the power of the Circuit Court to override them, goes to the jurisdiction of the federal Court, then it is manifest that the decree appealed from here was right. If, however, such question does not go to the federal jurisdiction, it nevertheless does go to the equity jurisdiction, and the State decrees being manifestly right as to the merits, it is apparent that there was no equity jurisdiction. There was no equity jurisdiction for another reason, viz.: that since the appellee was in possession of the land, and the right to such possession *was challenged by the bills*, the defendant was entitled to a jury trial as a matter of right (Gillespie *vs.* Gouly, 120 Cal., 515). Here were two plain grounds of want of equity jurisdiction.

Now, the Circuit Court decreed against the appellants on the ground of want of equity jurisdiction. The decree appealed from expressly states that the bills were dismissed for want of either federal or *equity jurisdiction*" (Tr., p. 41). As we have said, there was ample ground for this decision. But whether that is so or not, this Court must assume that there was such ground, for it cannot enquire into the question on certificate.

Smith *vs.* McKay, 161 U. S., 365.
Black *vs.* Black, 163 U. S., 678.
Tucker *vs.* McKay, 164 U. S., 701.

Such being the case, the decree dismissing the bill for want of equity jurisdiction must stand. It would not be disturbed by a reversal of the only part of the decree over which this Court has power on certificate. On the contrary, *it would be made better;* for, in case of such reversal, it would be plain that the Circuit Court *did* have jurisdiction, but that there was no cause of action. Of what earthly use would it be therefore for this Court to say upon certificate that the Circuit Court *had* federal jurisdiction? The decision as to the want of equity, after it became conclusive by reason of the failure of the appellants to take the case to the Circuit Court of Appeals, destroyed all the appellants' interest in the matter.

The case is not like what it might have been under the old Act regulating appeals. For there, this Court on appeal had power over the whole cause. Nor is it like what

it would be if the Circuit Court had decreed in favor of its jurisdiction, and the defendants had brought the case here on certificate on this ground; for, in such case, a reversal would necessarily cut away the whole decree.

Nor does the assertion by the Circuit Court that it had no jurisdiction nullify the decision which it did make on the merits. Notwithstanding such assertion, the record shows that *it did, in fact, assume jurisdiction of the cause, and did, in fact, decide it on the ground of want of equity jurisdiction.* The appellants should have gone to the Circuit Court of Appeals.

V.

In conclusion, we are constrained by our sense of duty to our client to submit whether this entire litigation in the federal Courts is not so entirely groundless as to amount to an abuse of the process of the Court. If this Court shall be of opinion that it is, we respectfully ask for such an expression of its opinion upon the question of the non-resident alienage of the appellee at the time of descent cast, as will afford us relief from further litigation on this ground in the federal Courts. This question was really decided by the decision dismissing the writ of error, if we correctly apprehend the matter. But, unfortunately for us, the Court seemed to consider the question so plain as not to require an opinion (167 U. S., 746). The result has been that what seems to us a causeless, and which is

certainly an expensive litigation, has been inflicted on our client.

Respectfully submitted,

W. H. H. HART,

Solicitor for ~~Complainants.~~ Appellee

JOHN GARBER,
ROBERT Y. HAYNE,
FREDERIC D. McKENNEY,
Of Counsel.

Office Supreme Court U.S.
FILED
[illegible]

Supreme Court of the United States.

JOHN W. BLYTHE and
HENRY T. BLYTHE,
Appellants,

vs.

FLORENCE BLYTHE HINCKLEY,
Appellee.

No. [illegible]

REPLY BRIEF

ON BEHALF OF APPELLEE, ON THE MOTION TO DISMISS OR AFFIRM.

W. H. H. HART,
Solicitor for Appellee.

JOHN GARBER,
FREDERIC D. McKENNEY,
ROBERT Y. HAYNE,
Of Counsel for Appellee.

IN THE

Supreme Court of the United States.

October Term, 1898.

No. 367.

JOHN W. BLYTHE, and
HENRY T. BLYTHE,
Appellants,

vs.

FLORENCE BLYTHE HINCKLEY,
Appellee,

16,952.

[The references are to the top pages of the printed record.]

The briefs of the learned counsel for the appellants have narrowed the discussion. No stress is placed upon any Federal statute, nor upon the epithets and legal conclusions scattered through the bills. Nor is it claimed that there is any showing of fraud, concealment or unfairness of any sort in the probate proceedings, nor that any attempt was made to remove any of the proceedings to the Federal Court. The entire

position seems to be that the decrees of the Superior Court awarding the property to Florence are absolute nullities, and can be collaterally attacked, because it is alleged that the State laws permitting aliens to inherit and providing for the institution of heirship were an invasion of the treaty making power. It is admitted that there was no treaty. (See brief of Messrs. Holladay & Chandler, p. 2.) But it is claimed that the power to make a treaty was of itself an exclusion of the power of the State to pass any law upon the subject, that, therefore, the common law as to aliens prevailed, and that the judgments of the Superior Courts contrary to the provisions of the common law are without jurisdiction.

Upon this question of the validity of the State judgments we stated that the Superior Courts sitting in probate were Courts of general jurisdiction. We find no denial of this in the briefs of Messrs. Holladay & Chandler. The other learned counsel does not directly deny that said Courts are of general jurisdiction; but he cites the case of Smith *vs.* Westerfield (See Judge McKisick's brief, p. 8), in which the opinion contains language to the contrary. What is there said, however, has not been followed. We cited the later decisions on page 28 of our brief; and as the learned counsel have not noticed them, we understand that they do not contest the point. It is not to be doubted that the Superior Court, whether sitting in probate or

not, is a Court of general jurisdiction. And it is not disputed that the Superior Court of San Francisco was the proper Superior Court to administer on Blythe's estate, because he died a resident of that city and county. (See our brief, p. 29.)

Thus the ground is cleared for the discussion of the only ultimate questions which seem to be relied upon, viz: Are the statutes of California an invasion of the treaty making power, and if so, did this render the State decrees absolute nullities? We have only a few observations to make upon the arguments of the learned counsel.

(1). They say that they "respectfully ask this Court "to decide the scope and judicial use of a motion to dis- "miss under the law of 1875." (See brief of Messrs. H. & C., p. 40.) We argued that there is no constitutional question involved. (See our brief, pp. 92-5.) So far as we can see, the learned counsel have not attempted to answer that argument; and it is apparent that it must prevail. This leaves only the certificate of jurisdiction. If the question could be considered, we might very well argue that the motion to dismiss was the equivalent of a general demurrer, especially in view of the fact that the appellants were allowed to amend their bills. But questions of mere procedure cannot be considered on certificate because they do not go to *the jurisdiction* of the Court.

(2). The learned counsel say that the complainants were ~~aliens~~ citizens of another State, and therefore could come into the Circuit Court with their bill, and that their coming in with a case of sufficient amount gave the Court jurisdiction to pass upon it, and that it was its duty to pass upon it. We prophesied that the counsel would so argue. (See our brief, pp. 95-8.) There are several answers to the position, viz:

a. No such question is certified. All the questions relate to the character of the questions arising in the case before the Circuit Court. (Tr., pp. 50-53.) We called attention to this in our opening brief (p. 95). The learned counsel have taken no further notice of it than to say that they have appealed on constitutional grounds as well as upon certificate. As already stated, there is no constitutional ground. (See our brief, pp. 92-5.)

b. The mere competency of the parties to come into Court is not the only thing necessary to call for the exercise of the powers of the Court. Suppose, for example, that an alien should come into the Circuit Court with a petition in bankruptcy, or with a complaint for a divorce against his citizen wife, or with a bill to set aside the election of the Governor of the State for fraud in his election, or to enjoin the State Legislature from passing a law, or to enjoin the State Courts from rendering a decision! No one would say that the Court could entertain such suits. Similarly we say here that

if it be apparent that the judgments of the State Courts are valid judgments, and that there is no semblance of ground for attacking them, the Federal Court has no jurisdiction to interfere with them, any more than it would have to interfere with the action of any other branch of the State Government. To do so would be to invite the very sort of collision between the two judicial systems which this Court has always deprecated and been so careful to avoid. And we submit that the decisions cited in our opening brief (pp. 96-7) sustain our position.

It was in this view that we addressed so much of our argument to the question of the validity of the judgments. While in one sense such argument goes to the merits, in another it goes to the jurisdiction. It does this in two aspects. In the first place, it shows that the bill does not present any of the exceptional cases in which the Federal Courts can interfere with the judgments of the State Courts. And, in the second place, it shows that the pretense of a constitutional question, or even of a jurisdiction, is frivolous and fictitious, and that no such question is really or substantially involved.

(3). The whole foundation of the appellants' case against the decrees consists in the claim that the State statutes permitting the inheritance of real property by non-resident aliens and providing for the institution of heirship are void because they are "an invasion of the

"treaty making power." To this we answered, in the first place, that the statutes in question are not void, because in the absence of a treaty the matter can be regulated by the States. We are content to rest upon our argument in that behalf. (See pp. 64-71.) The learned counsel say that if our position should be sustained the State law would present a "checkered ap-"pearance," because the statute would be valid as to the subjects of nations with whom the United States had a treaty, but not as to the subjects of nations with whom there was no treaty. (Brief of Messrs. H. & C., p. 33). But the same result would follow upon their own argument, only the treaty spots would be upon a common law ground instead of on a statutory one. Indeed, the "checkered appearance" would in all probability not be on our side at all, because our statute is *in favor* of the right of inheritance, and it would be a remarkable kind of a treaty which would stipulate for disabilities.

Counsel further say that a State might deprive non-resident aliens of the equal protection of the laws. It is sufficient in this regard to say that if such a case should ever arise, and should require a remedy, this Court will doubtless afford an appropriate one. Counsel's argument in that regard is merely the old fallacy of arguing against a use from a possible abuse.

Furthermore, notwithstanding the counsel's criticisms, we are confident that the question is covered by

the decisions of this Court. If we are correct in our views as to the "invasion of the treaty making power," then the statutes in question are valid, and there can be no pretext for cavil at the State judgments, and the appellants' whole argument falls to the ground.

In the second place, we said that even if the statutes in question were an invasion of the treaty making power the State judgments, however erroneous, would not be void. The vital proposition here is that the State Courts have concurrent jurisdiction with the Federal Courts over all Federal questions, unless such jurisdiction be taken away by removal proceedings. In addition to what is said in this regard in our opening brief (pp.76-7), we refer the Court to a recent case which subsequently came to our notice.

Plaquemines Fruit Co. *vs.* Henderson, 170 U. S., 511.

If the State Courts had jurisdiction to pass upon the Federal question, they must have had jurisdiction to pass upon it either way. Consequently their decision that the State statutes were valid, even if erroneous, cannot be void. But we may go further than this. Let us suppose that the State statutes are void, and even that the State Courts held them to be so. What is the consequence? Simply that the common law prevails. Now, if the common law be, as counsel say it is, and the decisions of the State Courts are contrary to the

common law, is that a reason why the decisions are nullities? Have the State Courts no jurisdiction to decide questions of common law erroneously?

The learned counsel cite decisions that a conviction in a criminal prosecution under a void statute is void. That is simply because the judgment of conviction must show on its face what the conviction is for. If the statute attempting to make the act a crime be void, the necessary result is that the judgment shows on its face that the act committed was an innocent act and that the accused committed no crime. It is strange to find gentlemen of ability and learning trying to stretch the authority of those decisions to cover judgments in civil cases, where the Court had undoubted power to award the subject of the litigation to one party or the other, and where, in order to sustain their position, they must ask the Federal Court to institute an inquiry into the mental processes of the Judges of the State Court. The mental processes of Judges do not rest in averment.

The learned counsel next make certain statements of fact. They say that the appellee did not set forth the fact of alienage in her petition for the determination of her heirship under Section 1664 (quoted in our opening brief, pp. 35-8), and that such fact "appeared "later *at the trial*" (Brief of Messrs. H. & C., p. 63), and "that the true relation, if any at all, of appellee to

"Blythe was kept out of sight, and not by appellee set "up in her initial pleading," (ib., p. 75); that the proceedings in the State Court were "practically ex "parte," and "appellants appeared therein, *but only to "deny the appellee's title*" (ib., p. 75), and that the appellants here "could not raise these questions, because "the initial proceeding to establish heirship was a "special, practically an ex parte proceeding, in which "defendants (appellants here) were unwilling defend-"ants. The whole case *was tried on the pleadings that "Florence chose to put it*". (Ib., p. 68.)

In reference to these statements, we make the following observations:

a. The bill, after showing the filing of the appellee's petition to determine the heirship and to have it adjudged "in substance that she, said Florence, was "the daughter and sole heir of said Thomas H. Blythe "under and by virtue of said Sections 230 and 1387 of "said Civil Code, or under and by virtue of one or the "other of said sections," expressly and explicitly stated that the appellants here—

> "appeared in said action or proceedings and filed "their answer therein, denying and contesting the "right and title of said Florence *and claiming for "themselves to be heirs of said Blythe;* that there-"after such proceedings were had in said Court in "the said cause that it was for the first time made "to appear plainly to the Court *upon the record*

"that said Florence was an illegitimate child; "that she was born in England," etc. (Tr., p. 9.)

The above averment is in the second amended and supplemental bill. The third amended and supplemental bill not only repeats the above averment but shows that the appellants here filed an answer *and cross-complaint*, "claiming for themselves to be heirs of "said Blythe." (Tr., p. 31.)

Doubtless the statements in the brief were made from inadvertence. In order to guard counsel against misapprehension, we took up about half of the brief whose length they advert to, with a careful statement of the case, giving references in every instance, and facilitating examination by running heads and a marginal index. We respectfully refer to that statement for the facts of the case.

b. But counsel do not claim that the second application, viz: the petition for partial distribution, did not state the fact of alienage. And their bill avers that it did. (Tr., p. 10.) The decree on this application distributed the land in controversy here to the appellee. We have shown in our opening brief that decrees of distribution are conclusive under the State law. (See pp. 43 and 46 and 91.) One decree therefor is as good for our purposes as a dozen. The learned counsel say that the decree upon the proceeding to determine heirship "was and is the only foundation for all subsequent

"action in the State Court." (Brief of Messrs. H. &. C., p. 75.) But if we assume that this was so, it makes no difference. A decision that a prior judgment was *res judicata* is not a Federal question.

N. P. R. R. *vs.* Ellis, 144 U. S., 458.
Adams *vs.* Louisiana, 144 U. S., 651.
Mut. Life Ins. Co. *vs.* Kirchoff, 169 U. S., 103.

c. It makes no difference whether the alienage question was set up in the pleadings in the Superior Court or not. The question of the appellee's capacity to inherit was necessarily involved in the judgment *that she did inherit.* If it were true that the appellants did not set the fact up in their answer, it is apparent that they might have done so. They are now making the same claim to the property that they made in the Superior Court; and under the doctrine of Cromwell *vs.* County of Sac., and the other cases cited in our brief (p. 74), the judgments of the Superior Court are conclusive of everything that might have been set up.

(4). The learned counsel argue that their bills show that upon the application for final distribution the Court refused them a hearing. We had not supposed that this point would be made, and gave it only a passing reference in our statement of the case. (See p. 10.) As the point has been made, we make the following answers to it:

a. According to the bills the question of the appellee's heirship to the whole estate had been twice previously determined in her favor by the Superior Court, viz, in the proceeding to determine heirship and by the decree of partial distribution. Its decrees were affirmed on appeal, and were standing upon its records in full force. Presumably the mandates from the Appellate Court were on file also. The bill does not, as we construe it, purport to state *all* the contents of such petition. (See Tr., p. 11 and pp. 32-3.) It would have been very natural for it to have stated the previous proceedings in the estate; and every presumption is in favor of the action of a Court of general jurisdiction, and is, moreover, against the pleader. That the petition did set forth the prior proceedings is to be inferred from the statement volunteered by counsel to the effect that the judgment in the initial proceeding "was and is " the only foundation for all subsequent action in the " State Court." (Brief of Messrs. H. & C., p. 75.) Furthermore, inasmuch as all the proceedings were *in the same estate*, the previous decrees were before the Court without being pleaded. For the object of the proceeding to determine heirship was to expedite the settlement of estate, and no further trial of the question was necessary or proper. In this regard the State Supreme Court has said, with reference to Section 1664:

"We have no doubt that the object of its enact-
"ment was to expedite such distribution by en-
"abling persons claiming interests in estates to
"have their claims determined in advance of the
"application for distribution, *and when such appli-*
"cation was made and came on for hearing, the Court
"would have no trial of such questions to make, and
"would at once decree to such person ascertained
"to be entitled the portion of the estate adjudged
"to him."

Re Oxarart, 78 Cal., 112.

This must necessarily be so, because to say that the Superior Court must retry the question is to say that it may arrive at a different conclusion. If it had done so, it would probably have had to answer a charge of contempt of the Appellate Court.

Such being the situation, it is no wonder that the Superior Court disregarded the pleading of the appellants, which apparently was in utter disregard of the previous proceedings, and did not deny the appellee's right to the land itself, but simply "denied the right of "said Florence to have said rents distributed to her, "and claimed that they were the next of kin of said "Thomas H. Blythe, deceased, and entitled to said "rents." (See Tr. pp. 11-12 and p. 35.) That was a mere trifling with the Court. It was just as if a party against whom this Court had decided a case in equity should go into the Circuit Court, upon the coming down of the mandate, and seek to retry the whole ques-

tion. And it is not unlike what these appellants desired the Circuit Court to do here, viz, to go into a formal investigation of matters of fact which they themselves set forth in their bills.

b. The decree of final distribution was merely of the rents and profits. While its necessary effect was to confirm the previous decrees (which, however, needed no information to make them final and conclusive) it operated directly only on the rents and profits. Now, the rents and profits are a mere incident to the litigation; and if the land was properly disposed of the incident would not sustain the jurisdiction.

Hipp vs. Babin, 19 How., 271.

(5). The learned counsel say that the question which they present was not decided by this Court in Blythe *vs.* Ayres (167 U. S., 746). If the Court will look into the arguments it will see what was there discussed. But independent of what was discussed, the dismissal of the writ of error necessarily involved one of three propositions, viz, either that no Federal question arose in the State Court, or, if it did arise, that it was correctly decided; or, if it arose and was incorrectly decided, that there were other State questions sufficient to support the decision. Either one of these grounds shows that the State decisions were not mere nullities, but were valid judgments. If no Federal question was involved,

what reason is there for claiming that the State judgments were invalid? If a Federal question was involved, but correctly decided, how does its *correct* decision render the judgment void, and why do the appellants come into the Federal Courts to have it decided differently? If a Federal question was incorrectly decided, but there was a separate State ground sufficient to uphold the judgments, why is not such ground as good in the Circuit Court as it was in this Court? Upon any view, we submit that the validity of the State judgments was necessarily affirmed by the dismissal of the writ of error by this Court. Now, what remains of even the semblance of a case for the appellants if the State judgments are valid?

(6). In our opening brief (p. 100) we respectfully requested the Court to relieve us of the curse of causeless litigation by expressing its opinion upon the jurisdiction of the Federal Courts to entertain attacks upon our muniments of title. Opposing counsel have joined in our request for an expression of the Court's opinion. (Brief of Messrs. H. & C., p. 73.) In this connection, we may add that the learned Circuit Court expressly stated in its final decree that it was "*without prejudice to com-*" *plainants' right to bring or maintain an action at law.*" (Tr., p. 41.) We do not consider ourselves at liberty to go outside of the record by stating why or on whose application this was done. But we most earnestly re-

quest the Court, in the interest of justice, not to leave us open to further attacks in the Federal Courts upon the ground that the question has not been decided.

Respectfully submitted,

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Of Counsel.

BLYTHE *v.* HINCKLEY.

APPEAL FROM THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 367. Submitted January 30, 1899. — Decided April 3, 1899.

It appearing from the opinion of the Circuit Judge that the various bills in this case were dismissed on the grounds: (1) That the jurisdiction of the Circuit Court could not be maintained because the state court, in the exercise of its general jurisdiction, determined the eligibility of the defendant Florence Blythe to inherit an estate which that court was called upon to distribute under the laws of the State, and that other propositions contended for by the complainants were for the same reason deemed insufficient to take this case out of the general rule that after a court of a State, with full jurisdiction over property in its possession, has finally determined all rights to that property, a court of the United States will not entertain jurisdiction to annul such decree and disturb rights once definitely determined; and (2) That the remedy of complainants, if any, was at law, and not in equity. *Held*, As neither ground went to the jurisdiction of the Circuit Court as a court of the United States, the appeal could not be sustained as within any class mentioned in § 5 of the Judiciary Act of 1891; and, if error was committed this was not the proper mode for correcting it.

This was a "complaint to quiet title," brought in accordance with the Code of Civil Procedure of California by John W. Blythe and Henry T. Blythe, citizens of the States of Kentucky and Arkansas, respectively, against Florence Blythe Hinckley, Frederick W. Hinckley and the Blythe Company, all citizens of California, which alleged that complainants were owners as tenants in common of the real property described therein, and that the defendants, "and each of them, claim that they have or own adversely to plaintiffs some estate, title or interest in said lands; but plaintiffs allege that said claims of defendants are false and groundless and without warrant of law, and their claims to said lands are a cloud upon plaintiffs' title thereto." Then followed an amended complaint, which repeated the allegations of the original complaint, with some other averments, among them, "that at the

time of the commencement of this suit neither one of the parties was in possession of said lands nor any part thereof." Thereafter a "second amended and supplemental bill in equity" was filed, which, among other things, set forth that Thomas H. Blythe was the owner of the real estate described at the time of his death; that he died in the city and county of San Francisco, April 4, 1883, being a citizen of the United States, and of the State of California, and a resident of said city and county; and that "after the death of said Thomas H. Blythe, as hereinbefore alleged, the public administrator of the city and county of San Francisco took charge of the estate of said Blythe and entered upon the administration of the same;" that Florence Blythe Hinckley was born in England, the child of an unmarried woman; that the mother was a British subject; that Florence remained in England until after the death of Thomas H. Blythe, when and in 1883, she came to California, being then an infant ten years old, and "ineligible to become a citizen of the United States;" and that she was "when she arrived in California a non-resident alien."

It was then averred that the laws in force in California in 1883 relating to the rights of foreigners and aliens to take real estate by succession as heirs at law of a deceased citizen of the State of California, were the treaty of 1794 between His Britannic Majesty and the United States, the naturalization laws of the United States, and section seventeen of article one of the constitution of California of 1879, which was made mandatory and prohibitory by section twenty-two; that there were at the death of Blythe certain laws in force in said State, to wit, sections 230 and 1387 of the Civil Code, providing for the adoption and legitimation, and institution of heirship, of illegitimate children; that there was not at any time during Blythe's lifetime any law in force in England under or by force of which he could have legitimated the said Florence or made her his heir at law, or under which he could have absolved the said Florence from allegiance to her sovereign, or, without bringing said Florence into California, have changed her status from a subject of England to that of a *bona fide* resident of California.

Statement of the Case.

It was further alleged that on a direct proceeding in the Superior Court of San Francisco, sitting in probate, brought on behalf of said Florence to determine the question of heirship, and to which action and proceeding complainants appeared, denying and contesting her application, that court adjudged in favor of Florence, and "decided, in substance and effect, that said Thomas H. Blythe had in his lifetime adopted and legitimated the said Florence;" that from that decree complainants appealed to the Supreme Court of the State, and that court "in substance and effect, decided that said Thomas H. Blythe did not adopt or legitimate the said Florence under or in conformity with said section 230 of the Civil Code, but that he had constituted her his heir under and pursuant to the provisions of section 1387 of said Civil Code." And it was charged that neither the Superior Court nor the Supreme Court had jurisdiction to render judgment in the matter, and that the decision of the Supreme Court was in violation of the constitution of the State of California, and inconsistent with numerous former decisions of that court.

The bill then set forth that said Florence filed in the Superior Court in the matter of the estate of Thomas H. Blythe a petition for distribution, to which complainants appeared, and the court on hearing granted a decree of partial distribution, which complainants charged was void for want of jurisdiction; that thereafter and after the marriage of said Florence to defendant Hinckley, she filed in the Superior Court her petition for final distribution of the estate, which was resisted by complainants, but the court entered thereon a decree of final distribution, which complainants charged was void for want of jurisdiction.

It was further stated that when the original bill was filed neither party was in possession of the land described, but that the same was in the possession of the public administrator of said city and county of San Francisco, and that since then Florence had secured and was now in possession of the property. The bill prayed for a decree quieting complainants' alleged title; for an accounting as to rents and profits; for a receiver; and for general relief.

Statement of the Case.

After the filing of the second amended and supplemental bill, Mrs. Hinckley moved to dismiss the suit for want of jurisdiction, which motion was sustained by the Circuit Judge, for reasons given in an opinion filed December 6, 1897. 84 Fed. Rep. 246.

After the court ordered the dismissal of the suit, the record shows that leave was given to complainants "to amend their bill upon the understanding that it would not necessitate any further argument, but should be subject to the prior motion to dismiss the second amended and supplemental bill and to the order for a final decree entered thereon." Accordingly on December 22, 1897, complainants filed their "third amended and supplemental bill in equity." This bill was substantially the same as that immediately preceding, though it set up reasons why an action at law would not be an adequate remedy, and amplified certain matters alleged to bear on the jurisdiction of the state courts. It averred that section 671 of the Civil Code of California, providing that "any person, whether citizen or alien, may take, hold and dispose of property, real or personal, within this State;" and section 672, providing: "If a non-resident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred;" were void as to aliens, because encroachments upon the treaty making power of the United States, and in conflict with section ten of article one of the Constitution of the United States, and with section 1978 of the Revised Statutes, and that therefore those courts were without jurisdiction; and also that when the state courts adjudged in favor of Florence because of Blythe's action under section 1387 of the Code, reading "every illegitimate child is an heir of any person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child," that section was made to operate in favor of Florence outside of the geographical jurisdiction and boundaries of California, and, as thus applied, was in violation of section ten, article one, of the Federal Constitution, and of section 1978 of the Revised Statutes, and an invasion of the jurisdiction of international intercourse, wherefore the adjudication was without

jurisdiction; and complainants further said that sections 671, 672 and 1387 of the Code were in conflict with treaties between the United States and Russia, France, Switzerland and England, and with the Constitution of the United States; and hence that the Circuit Court had jurisdiction "on the ground that the construction and application of the Federal Constitution are involved as well as on the ground of diverse citizenship of the parties, and because said section of said Civil Code violated the Federal Constitution as herein stated." On the same day, December 22, 1897, the final decree was entered in the case, the third paragraph of which was as follows: "That the original 'complaint' of the complainants, John W. Blythe and Henry T. Blythe, filed December 3, 1895, and also the 'amended complaint' of said complainants, filed December 12, 1895, and also the 'second amended and supplemental bill in equity' of said complainants, filed January 14, 1897, and also the complainants' third amended and supplemental bill, filed by leave of court this 22d day of December, 1897, after the rendition of the decision of the court upon the matters determined herein, but before the signing of this decree, be, and the same are each hereby, finally dismissed as against each and all of the parties named therein respectively as defendants, and in all respects and in every particular, for want of either Federal or equity jurisdiction and without prejudice to complainants' right to bring or maintain an action at law."

From this decree John W. Blythe and Henry T. Blythe prayed an appeal to this court, which was allowed and bond given March 2, 1898, and on the same day the Circuit Judge filed a certificate, certifying "to the Supreme Court of the United States pursuant to the Judiciary Act of March 3, 1891," fifteen questions of law, which it was stated arose "upon the face of said third amended and supplemental bill and upon said motion," namely, the motion to dismiss.

The first ten of these questions set forth that the Circuit Court sustained the motion to dismiss for want of jurisdiction to entertain the suit, and ordered it to be dismissed accordingly. The remaining five contained no statement as to their disposition.

Opinion of the Court.

It appears from the opinion of the Circuit Judge that the various bills were dismissed on the grounds: First, that the jurisdiction of the Circuit Court could not "be maintained because the state court, in the exercise of its general jurisdiction, determined the eligibility of the defendant Florence to inherit an estate which that court was called upon to distribute under the laws of the State;" and that "the other propositions contended for by complainants are for the same reason deemed insufficient to take this case out of the general rule that after a court of a State, with full jurisdiction over property in its possession, has finally determined all rights to that property, a court of the United States will not entertain jurisdiction to annul such decree and disturb rights once definitely determined."

Second, that the remedy of complainants, if any, was at law, and not in equity.

A motion was made to dismiss or affirm the appeal.

Mr. Frederic D. McKenney, *Mr. W. H. H. Hart*, *Mr. John Garber* and *Mr. Robert Y. Hayne* for the motion.

Mr. S. W. Holladay, *Mr. E. B. Holladay*, *Mr. Jefferson Chandler* and *Mr. L. D. McKisick* opposing.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

We have heretofore determined that review by certificate is limited by the act of March 3, 1891, to certificates by the Circuit Courts, made after final judgment, of a question in issue as to their own jurisdiction; and to certificates by the Circuit Courts of Appeal of questions of law in relation to which the advice of this court is sought. *United States* v. *Rider*, 163 U. S. 132.

Appeals or writs of error may be taken directly from the Circuit Courts to this court in cases in which the jurisdiction of those courts is in issue, that is, their jurisdiction as Federal courts, the question alone of jurisdiction being certified to this

court. The Circuit Court held that the remedy was at law and not in equity. That conclusion was not a decision that the Circuit Court had no jurisdiction as a court of the United States. *Smith* v. *McKay*, 161 U. S. 355; *Blythe Company* v. *Blythe*, 172 U. S. 644.

The Circuit Court dismissed the bills on another ground, namely, that the judgments of the state courts could not be reviewed by that court on the reasons put forward. This, also, was not in itself a decision of want of jurisdiction because the Circuit Court was a Federal court, but a decision that the Circuit Court was unable to grant relief because of the judgments rendered by those other courts.

If we were to take jurisdiction on this certificate, we could only determine whether the Circuit Court had jurisdiction as a court of the United States, and as the decree rested on no denial of its jurisdiction as such, but was rendered in the exercise of that jurisdiction, it is obvious that this appeal cannot be maintained in that aspect.

Nor can we take jurisdiction on the ground that the case involved the construction or application of the Constitution of the United States, or that the validity or construction of a treaty was drawn in question, or that the constitution or law of a State was claimed to be in contravention of the Constitution of the United States, within the meaning of the Judiciary Act of March 3, 1891.

The Circuit Court by its decree passed on none of these matters, unless it might be said that they were indirectly involved in holding the judgments of the state courts to be a bar; and, moreover, the decree rested on the independent ground that the remedy was at law.

Even if the decree had been based solely on the binding force of the state judgments, still we cannot hold that an appeal directly to this court would lie.

The Superior Court of San Francisco was a court of general jurisdiction, and authorized to take original jurisdiction "of all matters of probate," and the bill averred that Thomas H. Blythe died a resident of the city and county of San Francisco and left an estate therein; and that court repeatedly decreed

that Florence was the heir of Thomas H. Blythe, and its decrees were repeatedly affirmed by the Supreme Court of the State. So far as the construction of the state statutes and state constitution in this behalf by the state courts was concerned, it was not the province of the Circuit Court to reëxamine their conclusions. As to the question of the capacity of an alien to inherit, that was necessarily involved in the determination by the decrees that Florence did inherit, and that judgment covered the various objections in respect of section 1978 of the Revised Statutes, and the tenth section of article one of the Constitution of the United States, and any treaty relating to the subject.

We are not to be understood as intimating in the least degree that the provisions of the California Code amounted to an invasion of the treaty-making power, or were in conflict with the Constitution or laws of the United States, or any treaty with the United States; but it is enough for the present purpose that the state courts had concurrent jurisdiction with the Circuit Courts of the United States, to pass on the Federal questions thus intimated, for the Constitution, laws and treaties of the United States are as much a part of the laws of every State as its own local laws and constitution, and if the state courts erred in judgment, it was mere error, and not to be corrected through the medium of bills such as those under consideration.

Appeal dismissed.